Supreme Court, U.S.
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In The

Supreme Court of the United States

MYLES TAMASHIRO, *et al.*,

Petitioners

v.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAI'I, *et al.*

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the interpretation of the federal Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.*, by the Supreme Court of Hawai'i that prohibits a State from authorizing blind vendors to sue that State in state court for violations of state laws that impose requirements on state agencies that are not contained in federal law – which is contrary to thirty years of established practice in several other States and the statutory interpretation of two federal circuits – must be reversed because it upsets the federal-state balance absent a clear statement by Congress.

PARTIES TO THE PROCEEDING

Petitioners are Myles Tamashiro, Warren Toyama, Heather Farmer, Filo Tu, Jeanette Tu, Lynn Misaki, Clyde Ota, Miriam Onomura, and Yoshiko Nishihara (erroneously listed as Yoshiko Nishimura in the caption of the opinion of the court below).

Respondents are the Department of Human Services of the State of Hawai'i and the following state officials sued in their official capacity: Stephen Teeter, Joe Cordova, Dave Eveland, and Lillian B. Koller.

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PETITION FOR A WRIT OF CERTIORARI

Myles Tamashiro, Warren Toyama, Heather Farmer, Filo Tu, Jeanette Tu, Lynn Misaki, Clyde Ota, Miriam Onomura, and Yoshiko Nishihara respectfully petition for a writ of *certiorari* to review the judgment of the Supreme Court of the State of Hawai'i.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Hawai'i (App., *infra*, 1a-116a) is reported at 146 P.3d 103 (2006). The opinion of the First Circuit Court of Hawai'i entering partial summary judgment for petitioners on liability (App., *infra*, 124a-132a), and the final judgment of that court awarding petitioners injunctive and monetary relief (App., *infra*, 117a-123a) are unreported.

JURISDICTION

The Supreme Court of the State of Hawai'i entered its judgment on October 27, 2006. Justice Kennedy, on January 17, 2007, granted an extension of time within which to file a petition for a writ of *certiorari* to and including February 23, 2007, and on February 14, 2007, granted a further extension of time within which to file a petition for a writ of *certiorari* to and including March 15, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides: "The Judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The relevant provisions of the Randolph-Sheppard Vending Stand Act, 20 U.S.C. § 107 *et seq.*, are reprinted in the appendix of this petition at App., *infra*, 139a-154a.

The relevant provisions of the Hawai'i blind vendor law, Haw. Rev. Stat. § 102-14, are reprinted at App., *infra*, 154a-156a.

INTRODUCTION AND STATEMENT OF THE CASE

The Supreme Court of the State of Hawai'i ruled below that the federal statute that governs blind vendors in federal buildings requires that a federally-convened arbitration panel adjudicate claims brought against a State under a state statute that governs blind vendors in state or county buildings. That ruling defies the most fundamental principles of federalism. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Under its reasoning, a State can unwittingly waive all rights to have state law causes of action against the State adjudicated in its own courts, and can subject itself to federally-convened arbitration and a federal judicial review process. Congress did not intend this result when it enacted the federal statute and the Framers did not contemplate this result when they adopted the Eleventh Amendment.

The clearly erroneous ruling below conflicts with the decisions of two federal courts of appeals and the statutes or decisions of at least nine States. This Court should grant *certiorari* to resolve that conflict and review the anomalous result which unquestionably disrupts the Constitution's carefully crafted federal-state balance.

1. Statutory And Regulatory Framework

a. The Randolph-Sheppard Vending Stand Act (Randolph-Sheppard Act), 20 U.S.C. § 107 *et seq.*, requires that persons who are blind be given a priority "to operate vending facilities on any Federal property." *Id.* § 107(a). The statute, first enacted in 1936 and significantly amended in 1974, is intended to "provid[e] blind persons with remunerative employment, enlarg[e] the economic

opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting." *Ibid.*

The Randolph-Sheppard Act imposes obligations on all federal agencies to ensure that, "wherever feasible, one or more vending facilities are established on all Federal property." *Id.* § 107(b)(2). In addition, in order to discourage federal agencies or their employees from directly contracting for vending machines rather than for facilities or machines operated by blind vendors, the Randolph-Sheppard Act requires each federal agency to collect the profits from the operation of vending machines on federal property and to give that money either directly to blind vendors or to state agencies for the blind to be used for the benefit of blind vendors, subject to only minor exceptions. *Id.* § 107d-3(b)(2).

The Randolph-Sheppard Act relies upon participation by the States to implement the program on federal property. A state agency may apply to the Secretary of Education to be designated the "State licensing agency" under the Randolph-Sheppard Act. *Id.* § 107b. Federal law vests a designated State licensing agency with the authority to select the locations on federal property for vending facilities. *See id.* § 107a(c), 107a(a)(5). In addition, a State licensing agency is empowered to select the blind persons who will be licensed to operate the vending facilities at those federal locations. *See id.* § 107a(b).

A State licensing agency also receives the profits of vending machines operated on federal property in its State when no blind person is licensed to operate a vending facility at that particular location. Those funds must be used for the establishment of retirement or pension plans, for health insurance contributions, and for the provision of paid sick and vacation leave for blind licensees in that State, if a majority of the blind vendors licensed by the State so request. *Id.* § 107d-3(a), (c). Any funds remaining must be used only for, *inter alia*, the purchase and maintenance of vending equipment and the provision of management services. *Id.* § 107d-3(c), 107b(3).

In exchange for the authority to license vendors on federal property and the corresponding stream of income for the benefit of blind vendors in a State, a designated State licensing agency must agree to provide the blind vendors assigned to federal properties with initial stock and vending equipment, *id.* § 107b(2), and to provide training and follow-along services, *id.* § 107d-4.

The State licensing agency must also agree to a grievance process, including a hearing and arbitration, to resolve disputes between it and its licensees "arising from the operation or administration of the vending facility program." *Id.* § 107b(6). A blind licensee who is dissatisfied with a decision rendered as a result of the administrative hearing "may file a complaint with the Secretary [of Education] who shall convene a panel to arbitrate the dispute." *Id.* § 107d-1(a). The three-member arbitration panel is composed of one individual designated by the State licensing agency, one individual designated by the blind licensee, and one individual jointly designated by the other two members or, if no agreement can be reached, by the Secretary of Education. *Id.* § 107d-2(b)(1). The decision of that arbitration panel is "binding on the parties" and is subject to judicial review as final agency action for purposes of the federal Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *See* 20 U.S.C. § 107d-1(a).

b. In 1937, the Territory of Hawai'i established its own statute regarding blind vendors which was modeled on, but independent from, the federal statute. After statehood in 1959, the Hawai'i Department of Human Services decided to obtain a designation as a State licensing agency from the United States Department of Education.

As currently amended, the Hawai'i blind vending statute, Haw. Rev. Stat. § 102-14, regulates vending facilities in state and county public buildings. Respondent Hawai'i Department of Human Services is under an affirmative duty "to establish, whenever feasible, one or more vending facilities in all state and county public buildings," Haw. Rev. Stat. § 102-14(b), and to ensure "that

priority be given to registered blind or visually handicapped persons in the operation of vending facilities in state or county public buildings." *Ibid.*

Respondent issued state regulations that specifically differentiate the state blind-vendor program from the federal program. They provide a separate state rule to direct the disposition of income from vending machines on all state, city, or county property, *see* Haw. Admin. Rules § 17-402-17(n)(2), similar to, but distinct from, the rule governing income from vending machines on federal property, *see id.* § 17-402-17(n)(1). And the State established a state-operated trust account into which it deposited the income received from vending machines to be used for, among other purposes, a retirement or pension plan, health insurance, and sick and vacation leave for blind vendors within the State. *See* Haw. Rev. Stat. § 347-12.5.

2. Factual And Procedural Background

a. Around March 1995, petitioners learned that the City and County of Honolulu was not making space available in its public buildings for vending machines under the control of blind vendors, in plain violation of the state statute. The City and County had not given priority to blind vendors and, instead, had installed its own leased vending machines and kept the proceeds for its own use instead of depositing the money in the state-operated trust account. At the prodding of various blind vendors, respondent Hawai'i Department of Human Services requested that the City and County place blind-vendor-operated vending machines into City and County buildings, but the requests were ignored. App., *infra*, 16a-17a.

The Department took no further action, despite its authority under state law to oust the illegal vending machines and replace them with blind-vendor-operated vending machines. *See* Opinion Letter from Attorney General Robert A. Marks to Director of Human Services Winona E. Rubin, at 3 (Oct. 23, 1992). The Department's inaction permitted the City and County to accrue and retain

monies that should have been deposited in a state-operated trust account for the benefit of blind vendors across the State. App., *infra*, 3a, 17a.[1]

b. On February 13, 1996, the Hawai'i Committee of Blind Vendors, on behalf of blind vendors across the State (including petitioners), filed an administrative petition with the Director of the Hawai'i Department of Human Services pursuant to state law, *see* Haw. Rev. Stat. § 91-8, requesting a Decision and Order on the following question of state law: Whether Hawai'i Revised Statutes § 102-14 and its implementing regulations authorized the Department to place vending machines for the benefit of blind vendors in public buildings where the public building manager objected to such a placement. App., *infra*, 17a-18a.

The blind vendors anticipated that, if the Department acknowledged its authority to act in the face of local government intransigence, the Department would then act on its state law duty to place blind-vendor-operated vending machines on such local government property, so long as it was "feasible." Haw. Rev. Stat. § 102-14(b).

Six months later, on July 22, 1996, after having received no response yet to the administrative petition, petitioners, individual blind vendors, filed the instant dispute in the Circuit Court of the First Circuit, State of Hawai'i against the City and County of Honolulu and respondents Hawai'i Department of Human Services and various state officials for their failure to comply with Hawai'i state law.

At the request of respondents, the circuit court stayed the proceedings pending disposition of the administrative petition. Approximately one year after the suit was filed,

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[1] Concurrently, petitioners unsuccessfully attempted to persuade the City and County to voluntarily comply with state law by either (1) making space available in the City and County's public buildings to blind vendors for the operation of vending machines; or (2) paying remuneration to the state-operated trust account for the monies derived from the City and County's unlawful placement of vending machines in state and local buildings. *Id.* at 17a.

the Department of Human Services issued a Decision and Order in the state administrative proceeding, and correctly concluded that it "has authority to control both the placement of vending machines in all state and county public buildings and the income derived therefrom." Decision and Order, Haw. Dep't of Hum. Servs., at 5 (June 6, 1997). The City and County appealed that order but ultimately dismissed its appeal as part of a settlement. App., *infra*, 18a-19a n.9.

c. After the administrative order was issued, the judicial proceeding recommenced. App., *infra*, 18a. On cross-motions for summary judgment, the circuit court determined that Hawai'i Revised Statutes § 102-14 and Hawai'i Administrative Rules § 17-402-17 require respondent Department to collect vending machine income from public properties "where there is no individual blind vendor, and to retain and disburse such income for the sole purpose of benefiting blind vendors exclusively." *Id.* at 127a. The court explained that, under state law, "[t]he State of Hawaii is a trustee and the blind vendors, including Plaintiffs, are the beneficiaries. The corpus of the trust or *res* is composed of funds to be deposited" in a state-operated trust account. *Id.* at 128a. The court found that the respondents, as trustees, "owe[] full fiduciary obligations to the beneficiaries, the blind vendors" and had violated those obligations when, pursuant to an "unwritten policy," they had "failed, neglected or refused to implement and enforce [Haw. Rev. Stat.] § 102-14 and [Haw. Admin. R.] § 17-402-17 on County properties in the State of Hawaii." *Id.* at 129a, 130a.

Accordingly, the circuit court held that respondents, "as trustee[s], are chargeable with the amount required to restore the values of the trust estate, corpus or res, and trust distributions to what they would have been if the trust had been properly administered." *Id.* at 131a. The court rejected a claim of state sovereign immunity, ruling that Hawai'i Revised Statutes § 661-1 "vests in the circuit courts jurisdiction in all claims against the State founded upon any statute of the State, or upon any regulation of an

executive department, or upon any contract, express or implied, with the State of Hawaii." *Id.* at 137a.

The court then held a bench trial to determine the equitable relief and the amount of money to be returned to a trust for the benefit of the blind vendors. On September 27, 2000, the circuit court awarded $3,676,922 to be held in trust by the State for all blind vendors in Hawai'i. *Id.* at 119a. The court also awarded attorneys' fees and, as part of equitable relief, ordered the provision of investment services for management of the trust and expertise in the operation of respondents' blind vending program. *Id.* at 119a-122a.

Respondents appealed to the Hawai'i Supreme Court, but that court dismissed for lack of a final order because the circuit court had not formally disposed of petitioners' claim against the City and County of Honolulu, which had been resolved by settlement. *Id.* at 19a. Respondents then filed a new motion in circuit court to dismiss the suit in its entirety for lack of subject matter jurisdiction. They argued, for the first time, that the circuit court lacked jurisdiction because petitioners were required, as blind vendors, to adjudicate their state law claim under the *federal* law procedures established by the Randolph-Sheppard Act, which would require an evidentiary hearing before the Hawai'i Department of Human Services, followed by an arbitration convened by the federal Department of Education and, if necessary, an appeal pursuant to the federal Administrative Procedure Act as a matter of right to a federal district court. *Id.* at 20a.

The circuit court denied the motion to dismiss for lack of subject matter jurisdiction, *id.* at 21a, 119a, and entered a final judgment for petitioners, *id.* at 117a-123a.

d. A sharply divided Supreme Court of Hawai'i reversed. App., *infra*, 1a-116a.

Respondents conceded in that Court that, as a matter of state law, the Hawai'i Department of Human Services had waived its sovereign immunity to claims for equitable relief brought in the Hawai'i circuit courts for violations of state law. *See* Resp. Haw. Sup. Ct. Opening Br. 39 n.15.

And respondents did not contest that they had violated the Hawai'i blind vendor law, although they continued to contest the existence of a state law cause of action for money. *See* Resp. Haw. Sup. Ct. Reply Br. 1. Rather, respondents argued that, as a matter of federal law, the Hawai'i state law causes of action that permit the adjudication of state law claims for violations of Hawai'i Revised Statutes § 102-14 were preempted by the federal Randolph-Sheppard Act. *See* Resp. Haw. Sup. Ct. Opening Br. 38; Resp. Haw. Sup. Ct. Reply Br. 7-8.

A three-member majority of the state supreme court agreed. The court ruled that *federal* law adjudication procedures provide the *exclusive* means for blind vendors and States to resolve *state* law causes of action pertaining to vending machines placed on state or county properties. The court reasoned that when a State voluntarily decides to license blind vendors on *federal* property, it "must agree to several conditions enumerated in the federal" Randolph-Sheppard Act. App., *infra*, 25a. The court then concluded that, even though such conditions are directed at a State that licenses blind vendors pursuant to *federal* law on *federal* property, the federal arbitration provisions apply to disputes that arise under *state* statutes governing *state* blind vendor programs on *state and local* property. *Id.* at 30a; *see also id.* at 48a, 57a.

The Hawai'i Supreme Court acknowledged that its ruling is incongruous with the plain meaning of the Randolph-Sheppard Act, which "involves the operation of a 'vending facility on *any [f]ederal property*.'" *Id.* at 30a (quoting 20 U.S.C. § 107(a)). The court also acknowledged that the federal Randolph-Sheppard Act, "on its face," appears to require the State "to comply with the federal adjudication path only with respect to claims relating to its management of vending machines on federal property." *Ibid.* Nonetheless, the court ruled that States receive funds from vending machines on federal property and access to federal sites "[i]n consideration of the states' agreements to subject themselves to the federal adjudication path," including for claims under state law involving state programs. *Ibid.*; *see also id.* at 33a ("[W]e believe that the federal [Randolph-Sheppard Act]

mandates that the participating states, like Hawai'i, acknowledge and accept the federal adjudication path.").

The two dissenters strongly disagreed. They observed that "the majority holds that a federal law has the effect of divesting Hawai'i courts of jurisdiction over a state claim bought under a Hawai'i statute." *Id.* at 59a; *see also id.* at 60a. The dissent emphasized the sheer breadth of the decision below: "The majority's interpretation transforms the federal [Randolph-Sheppard Act] into a monolithic statute inclusive of virtually all state and county property in the United States, far beyond its present scope and directly contrary to Congressional intent." *Id.* at 61a.

The dissent acknowledged that a State's participation in the federal Randolph-Sheppard Act constitutes a waiver of sovereign immunity as to the federal adjudication of a claim arising on *federal* property. *Id.* at 65a. But the dissent reasoned that a "[w]aiver of sovereign immunity as a condition of participation in a federal program created by federal law does not, however, affect a state's sovereign immunity against being subjected to a lawsuit in federal court for a claim that arises from an alleged violation of a state statute." *Ibid.*

The dissent explained that, until the decision below, "no federal or state court has ever held that a state's participation in the federal [Randolph-Sheppard Act] divests the courts of that state of jurisdiction over state claims involving state property under a state [law]." *Id.* at 80a. Indeed, it noted that the majority's ruling conflicts with the longstanding policies of other state courts, which have repeatedly exercised jurisdiction over blind vendor claims arising from disputes involving state property under state statutes and regulations. *See id.* at 89a-91a, 106a-108a. Although almost all States participate in the Randolph-Sheppard Act program, the reasoning below means that "no state court would have jurisdiction to decide a state [blind vendor law] claim based on state law." *Id.* at 105a. This is because federal procedures are exclusive and mandatory under the majority's decision, regardless of whether they can provide vendors a meaningful remedy.

REASONS FOR GRANTING THE PETITION

States, not the federal government, provide most of the employment opportunities for blind vendors in the United States. There are approximately 2000 blind vendors who vend at state and local buildings under the auspices of 48 state laws modeled on the federal Randolph-Sheppard Act. *See* Rehabilitation Services Administration, U.S. Dep't of Educ., RSA-IM-06-09, *Summary of Statistical Information of the Randolph-Sheppard Vending Facility Program for Fiscal Year 2005*, at 3 (Aug. 3, 2006). That is about double the number of blind vendors who vend at federal buildings under the authority of the federal statute itself. *See id.*

Many of the state legislatures and the state agencies charged with implementing these state statutes have enacted laws and regulations that expressly provide for state remedies in state court for violation of these state laws benefiting blind vendors. And state courts, time-and-time again, have adjudicated the merits of claims between blind vendors and States regarding compliance with the state laws. The decision of the Hawai'i Supreme Court stands in direct conflict with this wide array of adjudications and state procedural mechanisms. It cannot be reconciled with the long-standing practices and results in these other States.

The ruling below imposes an exclusive federal remedial scheme on all the Hawai'i state law programs benefiting blind vendors, in conflict with the statutory interpretation adopted by the First and Federal Circuits. The Hawai'i Supreme Court misread the federal statute, contrary to basic tenets of federalism. Reading the Randolph-Sheppard Act to deprive vendors, all of whom are citizens of Hawai'i, of their state law causes of action against the State for violations of state laws injures those vendors in a way Congress could not and did not intend.

Review by this Court is warranted to resolve the conflicting statutory interpretations among the federal courts of appeals and the conflict among the States, whereby blind vendors in one State have had their access

to state court barred by a clearly erroneous interpretation of a federal statute, but vendors in other States remain entitled to state court adjudication of their claims.

A. The Ruling of the Hawai'i Supreme Court Is Contrary to the Decisions of the First and Federal Circuits and the Laws and Decisions of Other States

The decision below constitutes an unprecedented departure from more than three decades of state statutory authority and state court adjudications, as well as the decisions of two federal circuits, all of which recognize that the Randolph-Sheppard Act's federal remedial procedures do not preempt state law claims against States involving blind vendors on state and local property.

1. The ruling of the Supreme Court of Hawai'i on the reach of the remedial scheme of the federal Randolph-Sheppard Act is contrary to the decisions of the First and Federal Circuits.

The First Circuit addressed the application of the Randolph-Sheppard Act to vending facilities at interstate highway rest stops in *New Hampshire v. Ramsey*, 366 F.3d 1 (1st Cir. 2004). The court held that disputes about the State's placement of vending facilities at interstate highway rest stops, although required by a federal transportation act rather than the Randolph-Sheppard Act, nevertheless were "arising from the operation or administration of the vending facility program" under the Randolph-Sheppard Act and, therefore, were subject to the federal dispute resolution provisions of the Randolph-Sheppard Act. *Id.* at 22-23.

The First Circuit expressly explained, however, that its ruling did not apply to *all* circumstances of a state agency's placement of vending machines for the benefit of blind vendors. Rather, the court of appeals reasoned that, where State licensing agencies licenses vendors on "state property under the state[ ]" law, the States "do so in their general capacity as agencies of the state, not in their capacity as licensing agencies designated under the

[Randolph-Sheppard] Act." *Id.* at 23 n.23 (citation omitted). Thus, the First Circuit concluded, such activities are not part of "the vending facility program" subject to the Randolph-Sheppard Act remedial scheme. This ruling is consistent with the view taken by the legislature that had enacted the blind vendor statute of the State at issue in that case, New Hampshire, which expressly provides for state court remedies for violations of the state law. *See* page 15, *infra*.

In light of this precedent, it is clear that the instant case would yield a different result in the First Circuit. The claim by petitioners against the state respondents over the State's failure to abide by the state blind vendor law and regulations would *not* be treated as a claim against respondents in their capacity as licensing agencies designated under the federal statute. Therefore, petitioners' claim would *not* be subject to the federal arbitration and federal judicial review of the Randolph-Sheppard Act. Accordingly, the state court would not be divested of subject matter jurisdiction over this case. Such an action brought in state court would proceed in state court without imposition of a federal statutory remedial scheme.[2]

Likewise, in contrast to the ruling below, the Federal Circuit has recognized that not every claim pertaining to

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[2] The majority of the Hawai'i Supreme Court cited the Third Circuit's decision in *Delaware Department of Health & Social Services v. Department of Education*, 772 F.2d 1123 (1985), and the Eighth Circuit's decision in *McNabb v. Department of Education*, 862 F.2d 681 (1988), *cert. denied*, 493 U.S. 811 (1989), as evidence that federal courts have held that blind vendors can be forced into federal arbitration of claims arising from non-federal property. App., *infra*, 51a-55a. Those cases, however, involved only the question whether the Eleventh Amendment precludes enforcement of a federally-convened arbitration panel's monetary award against a State under the federal Randolph-Sheppard Act and not what issues were subject to arbitration. But to the extent *Delaware* and *McNabb* stand for the broader proposition that blind vendor claims under state law *must* be adjudicated in a federal arbitral forum, they plainly conflict with the decision of the First Circuit and provide additional justification for this Court's plenary review.

blind vendors is arbitrable under the procedures of the federal Randolph-Sheppard Act. In *Kentucky v. United States*, 424 F.3d 1222 (Fed. Cir. 2005), the Federal Circuit addressed the question of whether state licensing agencies have remedies outside of the Randolph-Sheppard Act against federal agencies that fail to comply with the Act—and that court expressly held that "not every complaint" is arbitrable under federal law. *Id.* at 1225. Rather, in the view of the Federal Circuit, the Randolph-Sheppard Act's remedial procedures apply to "only those complaints that allege a violation of the [Randolph-Sheppard Act] or its attendant regulations." *Ibid.* The court of appeals explained that Congress "enacted the arbitration provisions to *fill a gap* in the existing statutory scheme, under which vendors and state licensing agencies could bring claims based on a breach of contract or a violation of other federal procurement provisions, but could not bring a claim arising under the [Randolph-Sheppard Act]." *Id.* at 1226 (emphasis supplied). The law thus was not meant to "funnel every complaint" into federal arbitration. *Ibid.*

In reasoning directly applicable to the instant dispute, the Federal Circuit explained as follows:

> [I]t would be odd to interpret the statute to direct vendors and state licensing agencies into [Randolph-Sheppard Act] arbitration even if their complaints had nothing to do with a federal agency's violation of the [Randolph-Sheppard Act]. The arbitration system is administered by the Department of Education, which has expertise in the [Randolph-Sheppard Act], but no special expertise in general matters of federal procurement law. For claims relating to procurement disputes not based on the [Randolph-Sheppard Act] and its regulations, there would be no reason to bypass conventional bid protest and federal contract remedies in favor of arbitration by panels convened by the Secretary of Education.

Ibid. The same is true, of course, of the expertise lacking in the ad hoc arbitration panels convened by the

Department of Education with respect to state law claims alleging violations of state law duties and requesting remedies authorized by state law.

2. a. At least five States have enacted statutes that would be plainly preempted under the reasoning of the court below. These States expressly provide state law remedies in state courts to blind vendors aggrieved by actions of the state agency charged with implementing the state program that benefits blind vendors.

The State of Missouri provides that "[a]ny blind vendor who is dissatisfied with any action arising from the operation or administration of the provisions of [state law] * * * shall have standing *before the courts of this state* to seek review of the action or decision after having sought review by the administrative hearing commission." Mo. Ann. Stat. § 8.745 (emphasis supplied).

The State of West Virginia expressly provides that "any aggrieved blind vendor" may appeal "any unfavorable ruling" rendered after a fair hearing to a circuit court of a county. W. Va. Code § 18-10G-6(b).

The State of Kansas provides that "any blind person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of this act [a blind vendor statute] or other relevant statutes, shall be entitled to and shall have standing for judicial review thereof in accordance with the act for judicial review and civil enforcement of agency actions," Kan. Stat. Ann. § 75-3342, which in turn authorizes suit in state court. Kan. Stat. Ann. § 77-609.

The State of New Hampshire law provides that "[a]ny person aggrieved by a decision of blind services under this subdivision may apply for * * * appeal pursuant to [N.H. Rev. Stat. Ann. §] 541," which authorizes the person to "appeal by petition to the supreme court." N.H. Rev. Stat. Ann. §§ 186-B:15, 541:6.

The State of New York has adopted a remedial scheme which utilizes state-convened arbitration and in which the blind licensee ultimately can seek review in state court. New York law authorizes a "blind licensee who is

dissatisfied with any action arising from the operation or administration of the vending facility program" to file a complaint with the commissioner of the New York Department of Social Welfare. N.Y. Unconsol. Laws § 8714-a(d)(1). The state commissioner then convenes an "ad hoc arbitration panel" to make a recommendation, which the commissioner may either accept or reject. *Id.* § 8714-a(d)(2). The final decision of the commissioner can be challenged in state court. N.Y.C.P.L.R. § 7804.

b. Judicial rulings in four other States reflect similar state remedial schemes that provide state court adjudication of claims that the Hawai'i Supreme Court now would hold are without jurisdiction. State courts have repeatedly adjudicated allegations by their blind vendors that their States have violated state law in the 33 years since enactment of the federal arbitration requirements as part of the 1974 amendments to the Randolph-Sheppard Act.

For example, the Alabama Supreme Court has addressed whether state agencies have complied with state laws requiring that blind individuals be granted a preference or priority in the selection of vendors on state public property. *See, e.g.*, *Gundy v. Ozier*, 409 So.2d 764 (Ala. 1981).

Courts in Arizona, Ohio, and Pennsylvania have adjudicated claims by blind vendors that State licensing agencies have improperly revoked their licenses to vend at state or local government buildings. *See, e.g.*, *Marlar v. Arizona*, 666 P.2d 504 (Ariz. Ct. App. 1983); *Parr v. Ohio Bureau of Servs. For the Visually Impaired*, C.A. No. L-86-076, 1987 Ohio App. LEXIS 5632 (Ohio Ct. App. Jan. 23, 1987); *Wyer v. Commonwealth, Dep't of Publ. Welfare*, 475 A.2d 936 (Pa. Commw. 1984).

c. Interestingly, several States also have provided blind vendors a choice to seek redress through state law or federal law procedures, which again is in direct conflict with the ruling by the Hawai'i Supreme Court that federal law *mandates* utilization of the federal adjudication path for blind vendor claims brought under state law.

The Ohio Rehabilitation Service Commission has expressly acknowledged that a blind vendor may elect to seek recourse either through state law or the federal process set forth in the Randolph-Sheppard Act. Its regulations provide that a blind licensee "dissatisfied with an action" of the state bureau of services for the visually impaired may file a grievance with the director of the bureau and, if "dissatisfied with the director's decision, may make a request for a formal hearing." Oh. Admin. Code § 3304:1-21-14(A), (C), (H). After the formal hearing, the licensee must receive with the order "a statement that the order may be appealed in accordance with section 119.12 of the [Ohio] Revised Code. The licensee shall *also* be informed that a complaint may be filed as provided by section 107d of Chapter 6A of Title XX of the U.S.C.," *i.e.*, the Randolph-Sheppard Act. Oh. Admin. Code § 3304:1-21-13 (emphasis supplied).

The same is true of the regulations issued by the relevant state agencies in Arizona, Colorado, and Kentucky. *See* Ariz. Admin. Code § R6-4-325(B) ("A final decision * * * may be appealed by a [blind] operator either through judicial review pursuant to A.R.S. § 12-901 *et seq.* or through the Secretary of the U.S. Department of Education."); 12 Colo. Code Regs. § 2513-1 (9.411.2(D)(5)-(6)) ("If a blind operator is dissatisfied with the decision rendered after a full evidentiary hearing, he or she may request * * * that an arbitration panel be convened by filing a complaint with the Secretary of the Department of Education, authorized by Section 5(a) of the Randolph-Sheppard Act * * * . [H]e or she may also apply for a judicial review by the filing of an action for review in the appropriate State District Court."); 782 Ky. Admin. Regs. 1:010 § 7(2)(c) & (3) ("A vendor who is dissatisfied with the federal agency decision entered in the evidentiary hearing may seek judicial review in accordance with the provisions of KRS Chapter 13B * * * [or] request a federal arbitration by filing a complaint with the Commissioner of the Rehabilitation Services Administration in the United States Department of Education.").

B. The Hawai'i Supreme Court's Decision Reads a Federal Statute Contrary to the Plain Text of the Statute, Principles of Federalism, and the Federal Administrative Interpretation

The ruling of the Supreme Court of Hawai'i is contrary to the plain text of the federal Randolph-Sheppard Act, conflicts with important federalism-based canons of statutory construction long established by this Court, and is inconsistent with the views of United States Department of Education and the Act's legislative history.

1. Nothing in the text of the Randolph-Sheppard Act reflects an intent to preempt state causes of action against States for violations of state law. The relevant text of the federal statute provides that a Randolph-Sheppard State licensing agency must agree to provide a hearing to a blind licensee "dissatisfied with any action arising from the operation or administration of the *vending facility program*," 20 U.S.C. § 107b(6) (emphasis added), and that the blind licensee may file a complaint with the Secretary of Education if "dissatisfied with any action taken or decision rendered as a result of such hearing." 20 U.S.C. § 107d-1(a).

Congress did not provide a specialized definition of the term "vending facility program." Therefore, the natural reading of the term governs and "vending facility program" must be read to be the program established by the Randolph-Sheppard Act, *i.e.*, the program for licensing to blind vendors vending facilities on federal property. *See Ramsey*, 366 F.3d at 23 (defining "vending facility program" to not include state law blind vendor programs on state properties).

The language elsewhere in the Randolph-Sheppard Act, 20 U.S.C. § 107a(a)(5), does not support a different reading. Section 107a(a)(5) provides that the United States Secretary of Education shall designate a state agency to issue licenses to blind vendors for "vending facilities on Federal or other property in such State." 20

U.S.C. § 107a(a)(5). The Hawai'i Supreme Court concluded that the reference in that provision to "other property in such State" somehow swept all state public property under the purview of the Randolph-Sheppard Act. App., *infra*, 31a. But that reasoning is untenable, as the dissent below explained. *Id.* at 75a-83a. Nothing in the Randolph-Sheppard Act requires a State, even upon becoming designated as a licensing agency under federal law for the placement of vending machines on federal property, to open its state public buildings to blind vendors. States that opt to implement the federal program for federal properties in exchange for the authority to place blind vendors on federal property, *see* page 3, *supra*, are not required as a matter of federal law to extend the Randolph-Sheppard Act's requirements to state and local properties. Whether to do so is left solely to the discretion of each State. As such, the term "other property in such State" merely requires that the public agency that is designated as the agency to license blind vendors of federal property in a State be the *same* agency that licenses any blind vendors on other property in the State, if state law so authorizes such licensing. There is no reason that such optional state programs should fall within the scope of the federal term "vending facility program" within the meaning of 20 U.S.C. § 107b(6).

Indeed, other provisions of the federal statute and its overall structure weigh against the Hawai'i Supreme Court's reading. When Congress intended a requirement to apply to state programs dealing with blind vendors at state and local facilities – and not just those blind vendors who have their vending facilities located on federal property – Congress used different language that specifically focused on the State: "the *State* vending facility program" or "the *State* program." 20 U.S.C. § 107b-1(1), (2) (emphases supplied). Thus, there is no reason to view the unadorned term "vending facility program" in Section 107b(6) to encompass such additional state programs that are created as a matter of state discretion.

2. Important clear statement rules of statutory construction, which are rooted in significant federalism doctrines, also weigh heavily against the ruling below.

This Court requires a clear statement that a State has waived its sovereign immunity to suit in court, *see Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543-544 (2002), based on the respect that is due a State's sovereign choices and dignitary interests. Those same concerns should require a clear statement by Congress to override a waiver of sovereign immunity by a State.

In the instant case, the State of Hawai'i made a deliberate choice to waive its sovereign immunity in its own courts against claims by its citizens that it violated state law. *See* Haw. Rev. Stat. § 661-1; *see also Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992) (describing Haw. Rev. Stat. § 661 as "waiving the State's sovereign immunity in certain cases"), *cert. denied*, 507 U.S. 918 (1993). Indeed, respondents admitted below that, apart from the supposed preemptive effect of the federal Randolph-Sheppard Act, the state courts had jurisdiction to hear petitioners' state law claims against the State for prospective relief. *See* Resp. Haw. Sup. Ct. Opening Br. 39 n.15 ("Sovereign immunity does not bar *prospective* injunctive relief under § 661-1."); Resp. Haw. Sup. Ct. Reply Br. 1 ("State may be held liable for prospective injunctive relief without violating its sovereign immunity").

Requiring a clear statement by Congress that it intended to override such an unambiguous state waiver of immunity against suit in the State's *own courts* is especially important here where the alternative remedy supposedly imposed by Congress on the State would be adjudication of the state law claims against the State by a federally-convened arbitration panel, possibly subject to federal judicial review under the standards of the federal Administrative Procedure Act. States have vigorously, and with varied degrees of success, argued that their agreement to participate in administration of the federal Randolph-Sheppard Act does not include a waiver of their

Eleventh Amendment immunity to have arbitration results reviewed and enforced by the federal courts, even with regard to the federal vending facilities that clearly are part of the federal program. *Compare Tennessee Dep't of Human Servs. v. United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (State did not waive immunity for damages), *with Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997) (States waived immunity to all forms of relief), *cert. denied*, 522 U.S. 1147 (1998).

Certainly, an unambiguous statement should be required on the part of Congress to divest state courts of subject matter jurisdiction and to impose a requirement that state citizens adjudicate state law claims against States in federal court. As this Court has observed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The Hawai'i Supreme Court's reading of the Randolph-Sheppard Act has turned this constitutional rule on its head by holding that individuals *must* have their state law claims against a State adjudicated by a federally-convened arbitration panel and reviewed in federal court under the standards of the federal Administrative Procedure Act. This dramatic shift in the federal-state balance necessitated by the ruling below would require a clear statement that is lacking in the Randolph-Sheppard Act. *See Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement").[3]

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[3] In the instant case, the state respondents waived any Eleventh Amendment immunity against federal court enforcement of an arbitration judgment because they affirmatively and successfully argued in this

(Continued on following page)

Another fact that weighs heavily against the interpretation given the Randolph-Sheppard Act by the Hawai'i Supreme Court is that it preempts pre-existing common law claims. This Court, however, has articulated a presumption against federal preemption of state common law claims "in areas of traditional state regulation" absent "clear and manifest" evidence of such a preemptive intent by Congress. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005); *accord CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). Plainly, a State's choice about what actions and remedies it will permit its citizens to bring against it in state court is an area of traditional state regulation, *see Alden v. Maine*, 527 U.S. 706, 745-747, 755 (1999), and thus should be presumed not preempted. Nothing in the text or structure of the Randolph-Sheppard Act overcomes this presumption.

3. The ruling by the Hawai'i Supreme Court also fails to accord the required deference to the interpretation of the United States Department of Education to the extent any ambiguity could be discerned in the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

The Department of Education, pursuant to an explicit congressional grant of authority to promulgate regulations to implement the 1974 amendments to the Randolph-Sheppard Act, *see* 20 U.S.C. § 107a(a)(6), engaged in formal notice-and-comment rulemaking that yielded regulations governing, *inter alia*, the grievance procedures required by States participating in the federal program. In the course of the rulemaking, State licensing agencies requested that the regulations "ensure that common procedures * * * be established to cover both those blind

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case that federal court is the venue in which petitioners are able to obtain relief, including monetary relief. *See* Resp. Haw. Sup. Ct. Opening Br. 33; *see also Lapides v. Board of Regents*, 535 U.S. 613 (2002) (States may waive immunity through litigation conduct); *Ramsey*, 366 F.3d at 35-39.

vendors located on Federal property and those located on other property," because "the imposition of separate [hearing] procedures" for vendors on federal and non-federal property "would be unnecessarily duplicative." 42 Fed. Reg. 15,802, 15,803 (1977).

The Department of Education refused to adopt regulations to govern the procedures for claims involving non-federal property. The federal agency explained that the Act "continues to emphasize the operation of vending facilities by blind persons on Federal property" and thus "[i]n such matters as * * * arranging for the distribution of vending machine income, the Act does not extend any requirements directly to vending facilities established by State licensing agencies on property other than Federal property." *Ibid.* The Department therefore merely recommended "that common procedures be adopted to the greatest extent possible by the States licensing agencies to cover all blind vendors within State vending facility programs." *Ibid.*

The Department's refusal to *require* that State licensing agencies extend the hearing provision of the Randolph-Sheppard Act to blind vendors not located on federal property confirms that the agency charged with administration of the Act does not interpret the Act as establishing the exclusive procedural remedies for all blind vendors under state programs. And the hearing provision is a condition precedent to the federal arbitration required by Section 107d-1(a), which applies only to a licensee who is dissatisfied with the result of such a hearing. This interpretation, which is entitled to *Chevron/Mead* deference, further confirms the error of the court below.

The Department of Education's view that the Randolph-Sheppard Act does not require that the federal arbitration scheme apply to all state vendors' grievances apparently does, however, leave that scheme available as an optional remedy for state vendors. The Department of Education has exercised its authority under the Randolph-Sheppard Act, albeit without any discussion, to convene arbitration panels to resolve complaints about the

results of hearings held by State licensing agencies that have encompassed disputes about a State licensing agency's compliance with state law. *See* Resp. Haw. Sup. Ct. Reply Br., Apx. 18 (collecting arbitration decisions). There is no certainty that the federal courts, if squarely faced with the question, would sustain such an exercise of authority by the Department of Education. Whatever the appropriateness of this apparently unexamined exercise of administrative authority when it comes to providing a *supplemental* remedy to blind vendors, nothing in the Department of Education's practices reflects a congressional intent to *eliminate* pre-existing remedies already provided by the States, as happened here.

Likewise, the Act's legislative history does not support the Hawai'i Supreme Court's decision. The congressional conference report on the 1974 amendments that enacted the federal arbitration scheme described the arbitration provision as "requir[ing] State agencies to submit to arbitration of grievances." S. Rep. No. 93-1270, at 35 (1974). There is no discussion in the committee reports or the congressional hearings that the arbitration provision would require *blind vendors* to submit to federal arbitration of grievances if there were alternative available state remedies. This silence is particularly noteworthy in light of the fact that Congress was aware of pending court litigation by blind vendors against state agencies claiming violations of state law. *See Randolph-Sheppard Act for the Blind Amendments of 1973: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 128 (1973) (statement of National Federation of the Blind).

C. Denial to Blind Vendors of Their State Cause of Action for the State's Violations of a State Statute Has Significant, Practical Adverse Consequences Not Only for Those Blind Vendors But Also for the State

The facts of this case demonstrate the significant adverse consequences for both the blind vendors and the State alike under the Hawai'i Supreme Court's imposition of the federal arbitration and judicial review framework in these circumstances.

1. This case involves state common law doctrines concerning trusts and fiduciary duties. It is critical to the interests of the blind vendors and the State to not be forced to have such state law issues decided by a federally-convened arbitration panel whose members need not even be attorneys or have any legal training, much less have a background in the common law of a particular State. *See* 20 U.S.C. § 107d-2(b)(1) (not imposing any requirements on eligibility for being appointed as an arbitrator); *cf. Reasonable Costs of Arbitration Under the Randolph-Sheppard Act*, 61 Fed. Reg. 16,701 (1996) (Department of Education encourages, but does not require, parties to select arbitrators from local community). By contrast, petitioners' state court suit against the State would be adjudicated by judges well-versed in state law, *see* Haw. Const. art. VI, § 3 (Circuit Court judges, who must have been licensed to practice law in Hawai'i for not less than ten years, are selected for ten-year terms by the Governor from a list provided by the Judicial Selection Commission), subject to review by the Hawai'i Supreme Court.

Furthermore, a particularly anomalous result of the decision below is that federally-convened arbitration panels would determine the extent to which the State has waived sovereign immunity with respect to state law claims brought by citizens of that State. In the instant dispute, the circuit court found such a waiver. *See* App.,

infra, 137a. But, under the view of the Hawai'i Supreme Court, arbitration panels now will make that determination in the first instance. And, any appeal from the arbitration panel will go to a federal court which, because of *Pennhurst*, has no experience adjudicating state law claims against the State. Thus, in these instances involving state sovereignty, the parties particularly benefit from having a decision rendered by decisionmakers vested with authority by the same sovereign (*i.e.*, the People of Hawai'i) who empowered the legislature to enact the laws and charged the executive branch with faithfully executing those laws.

2. The fact-finding process will be significantly different in cases such as petitioners' under the new rule announced by the Hawai'i Supreme Court in this case. The federally-convened arbitration panel has no authority to compel documents or testimony of third parties. *See* Rehabilitation Services Administration, U.S. Dep't of Educ., *Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(a) and 6 of the Randolph-Sheppard Act as Amended*, at § 9(c) (Feb. 3, 1978) ("The arbitration panel does not have the authority to compel by subpoena the production of witnesses, papers, or other evidence."). Indeed, even the opportunity to take depositions of the opposing parties is subject to the discretion of the arbitration panel chairperson. *See id.* § 12. Also, facts found by an arbitration panel are subject to judicial review only to determine if they are supported by "substantial evidence" in the administrative record. *See* 5 U.S.C. § 706(2)(E).

By contrast, petitioners in the state court proceeding below, before the case was dismissed for want of jurisdiction, were able to engage in appropriate discovery, including reliance on the subpoena authority of the court to obtain documents from third parties, such as documentation of soda vending machine lessors on the amount of revenues that the vendors had lost due to violations of state law. Also, factual findings by the trial

court are subject to a stricter standard of review because they will not be sustained if clearly erroneous, *see* Haw. R. Civ. P. 52(a), and that difference can be outcome determinative. *See Dickinson v. Zurko*, 527 U.S. 150, 153, 163 (1999).

3. The remedial authority of a federally-convened arbitration panel is likely more restrictive than the Hawai'i state courts. There is no mechanism in the federal statute to oversee and enforce compliance with an arbitration panel's injunctions. Additionally, several federal arbitration panels have disclaimed the authority to award damages. *See In re Bedard*, 48 Fed. Reg. 20,117 (1983); *In re Waldie,* 60 Fed. Reg. 31,289, 31,290 (1995); *In re Fracasso*, 62 Fed. Reg. 59,582, 59,583 (1997). Some arbitration panels have held they lack the authority to award attorneys' fees to a prevailing blind licensee. *See In re Bedard*, 48 Fed. Reg. at 20,117; *In re Everett*, 50 Fed. Reg. 38,446, 38,447 (1994); *In re Travers*, 60 Fed. Reg. 30,527, 30,528 (1995); *In re Waldie*, 60 Fed. Reg. 31,290; *In re Fracasso*, 62 Fed. Reg. 59,583. As noted above, the federal courts are also divided on the question on the ability to enforce any monetary awards awarded by an arbitration panel.

By contrast, Hawai'i courts have general authority to use their full remedial authority to redress a violation of state law. This includes both injunctive relief, such as the decree entered by the trial court in this case, as well as damages necessary to make petitioners whole. *See Jacober v. Sunn,* 715 P.2d 813, 821 (Haw. Ct. App.) (Section 661-1 waives State's sovereign immunity to award of money to recover "benefits wrongfully denied" so that executive branch cannot "violate the legislative mandate" with impunity), *cert. denied*, 68 Haw. 691 (1986). Failure to comply with the court's judgment can result in contempt sanctions. Furthermore, the trial court may, as a matter of Hawai'i law, award attorneys' fees to a prevailing plaintiff even absent an express statutory grant of authority. *See Montalvo v. Chang,* 641 P.2d 1321 (Haw. 1982) (circuit court vested with authority to allow attorneys' fees from funds recovered from State for benefit of class and citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), involving a plaintiff vindicating the rights of a trust); *see*

also In re Water Use Permit Applications, 25 P.3d 802 (Haw. 2001) (reserving question whether Hawai'i law recognizes equitable authority to award attorney's fees to "private attorneys general").

* * *

This lawsuit, at its core, is about obtaining State compliance with a state law that is intended primarily to provide money to support blind vendors' retirement or pension plans, health insurance contributions, and paid sick leave. Several of petitioners are at, or past, retirement age but cannot retire because there are insufficient funds in the state-operated trust account to support them.

Respondents raised the argument that the federal Randolph-Sheppard Act somehow required petitioners to rely on the federal arbitration procedure for adjudication of their state law claims against the State (an interpretation adopted by no other court) for the first time five years after the lawsuit was filed, and only *after* losing on the merits in the trial court and being ordered to provide almost $4 million to a state-operated trust fund and additional equitable relief to prevent the problem from recurring.

Petitioners should not be required to take their claim to a new forum for relitigation, when the court below clearly erred in directing them to that forum, contrary to more than thirty years of established practice in a number of other States as well as the statutory interpretation of two federal circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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MARCH 15, 2007

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIMURA,
Plaintiffs-Appellees/Cross-Appellants,

vs.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAI'I; STEPHEN TEETER, in his capacity as Business Manager for Ho'Opono, JOE CORDOVA, in his capacity as Administrator of the Division of Vocational Rehabilitation, State of Hawai'i, Department of Human Services; DAVE EVELAND, in his capacity as Administrator of the Services to the Blind Branch of the State of Hawai'i, Department of Human Services; and LILLIAN B. KOLLER, in her capacity as Director of the State of Hawai'i, Department of Human Services,[1]
Defendants-Appellants/Cross-Appellees,

and

CITY AND COUNTY OF HONOLULU, Defendant.

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[1] Pursuant to Hawai'i Rules of Appellate Procedure Rule 43(c) (2004), Stephen Teeter, Joe Cordova, and Lillian B. Koller were substituted as parties to the instant appeal.

NO. 24552

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-3011)

OCTOBER 27, 2006

MOON, C.J., NAKAYAMA, J., AND CIRCUIT JUDGE WATANABE, IN PLACE OF DUFFY, J., RECUSED; CIRCUIT JUDGE POLLACK, IN PLACE OF LEVINSON, J., RECUSED, DISSENTING, WITH WHOM ACOBA, J., JOINS

OPINION OF THE COURT BY MOON, C.J.

This case arises from the alleged failure of defendants-appellants/cross-appellees Department of Human Services (DHS), State of Hawai'i (the State), Lillian B. Koller, Joe Cordova, Dave Eveland, and Stephen Teeter[2] [hereinafter, collectively, the State defendants] to enforce Hawai'i Revised Statutes (HRS) §§ 102-14 (Supp. 2005) and 347-12.5 (1993), quoted *infra,* and the implementing regulation, Hawai'i Administrative Rules (HAR) § 17-402-17, quoted *infra,* [hereinafter, collectively, the Hawai'i Randolph-Sheppard Act (the Hawai'i RSA)] as against defendant City and County of Honolulu (the City). Briefly stated, the Hawai'i RSA is modeled after the federal Randolph-Sheppard Vending Stand Act, discussed *infra,* which grants priority to blind and visually handicapped individuals who desire to

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[2] The named individuals are sued in their official capacities of employment with the State. Lillian B. Koller is the Director of DHS; Joe Cordova is the Administrator of DHS's Division of Vocational Rehabilitation; Dave Eveland is the Administrator of DHS's Services to the Blind Branch; and Stephen Teeter is the Business Manager for the Blind in the branch of DHS known as "Ho'opono." *See supra* note 1.

operate vending facilities on federal property. The Hawai'i RSA applies to state and county properties. The City allegedly (1) did not give priority to visually handicapped individuals licensed by DHS to operate vending facilities [hereinafter, the blind vendors] in its public buildings and (2) did not transfer to the State defendants the commissions collected from the City's own vending machine operation, both of which were allegedly in contravention of the Hawai'i RSA.

Plaintiffs-appellees/cross-appellants Myles Tamashiro, Warren Toyama, Heather Farmer, Filo Tu, Jeanette Tu, Lynn Misaki, Clyde Ota, Miriam Onomura, and Yoshiko Nishihara [hereinafter, collectively, the plaintiffs], who are licensed blind vendors, sought declaratory, monetary, and equitable relief (including injunctive relief) against the State defendants and the City[3] for their alleged failure to, respectively, enforce and comply with the requirements of the Hawai'i RSA. The plaintiffs maintained that the State defendants were required to ensure that: (1) vending machine income generated from state and county operations be paid into the Randolph-Sheppard Revolving Account [hereinafter, the RSR Account]; and (2) those funds were reserved for the use and benefit of the State's blind vendors.

The State defendants appealed, and the plaintiffs cross appealed, from the August 22, 2001 final judgment of the Circuit Court of the First Circuit, the Honorable Eden E. Hifo presiding, finding in favor of the plaintiffs and against the State defendants. The trial court awarded the

[3] As discussed *infra*, the plaintiffs settled with the City; therefore, the City is not a party to the instant appeal.

plaintiffs, *inter alia,* money damages in the amount of approximately $3.67 million.

The State defendants, on appeal, and the plaintiffs, on their cross appeal, challenged various pre-trial and post-judgment rulings made by the trial court. However, inasmuch as we hold that subject matter jurisdiction is lacking, we need not address the parties' challenge to these various pretrial and post-judgment rulings. Accordingly, we reverse the circuit court's August 22, 2001 final judgment.

I. BACKGROUND

A. Legal Background

1. The Randolph-Sheppard Vending Stand Act

Congress enacted the Randolph-Sheppard Vending Stand Act [hereinafter, the federal RSA] in 1936, amending the federal RSA twice, in 1954 and 1974. Pub. L. No. 74-732, §§ 1-7, 49 Stat. 1559, 1559-60 (1936); Pub. L. No. 83-565, § 13, 68 Stat. 652, 663-65 (1954); Pub. L. No. 93-516, §§ 200-11, 88 Stat. 1617, 1622-31 (1974); *see also* Pub. L. No. 93-651, §§ 200-11, 89 Stat. 2-3, 2-7 to 2-16 (1974) (codified as amended at 20 U.S.C. §§ 107 to 107f (2000)). The federal RSA establishes a cooperative federal-state program [hereinafter, the federal RSA program or the program] that "provid[es] blind persons with remunerative employment, enlarg[es] the economic opportunities of the blind, and stimulat[es] the blind to greater efforts in striving to make themselves self-supporting" by authorizing licensed blind persons "to operate vending facilities on any [f]ederal property" and granting them "priority" in such operation. 20 U.S.C. § 107(a)-(b).

Under the federal RSA, states can gain access to federal properties in their respective states to operate blind vending facilities by having one of its state agencies apply to the United States Department of Education (USDOE) to be designated as a "state licensing agency" (SLA), and, as discussed more fully *infra,* states must agree to a number of conditions. *See New Hampshire v. Ramsey,* 366 F.3d 1, 6 (1st Cir. 2004) ("States' participation in the program is voluntary."). The SLAs, in turn, license blind persons to operate vending facilities and match them with available contracts on federal property. 20 U.S.C. § 107b.

Examination of the evolution of this unique federal statutory scheme reveals that the original federal RSA was designed to create employment opportunities for the blind on federal property and for further federal rehabilitative efforts on behalf of the blind. H.R. Rep. No. 1094, 74th Cong., 1st Sess. 1, 2 (1936). As originally designed, no priority or preference was given to blind vendors to operate vending facilities on federal property. *Id.*; *see also* Pub. L. No. 74-732, §§ 1-7, 49 Stat. at 1559-60. The 1954 amendment, however, strengthened the federal RSA by, *inter alia*: (1) authorizing a *preference,* where feasible, to blind vendors to set up vending stands on federal property, Pub. L. No. 83-565, § 4, 68 Stat. at 663; *see also* 20 U.S.C. § 107a(b) (providing that SLAs "give preference to blind persons who are in need of employment"); and (2) requiring that participating states (*i.e.,* SLAs) agree "to provide any blind licensee dissatisfied with any action arising from the operation or administration of the vending stand program an opportunity for a fair hearing," Pub. L. No. 83-565, § 4, 68 Stat. at 664. The 1954 amendment did not, however, specify the nature of the

hearing or the relief which should be afforded as a result of such a hearing.

In 1969, Congress proposed additional amendments

> because of the weak showing in the number of blind vendors operating on federal property, the growing trend toward installation of vending machines and the exclusive use of machines in some federal buildings, as well as increasing use of vending machine income by federal employees for recreation and welfare purposes. S. 2461 was designed to protect the blind preference established in the 1954 amendment[]. S. Rep. No. 1235, 91st Cong., 2d Sess. 2 (1970).

Texas State Comm'n for the Blind v. United States, 6 Cl. Ct. 730, 732 (1984) (footnote omitted), *rev'd on other grounds,* 796 F.2d 400 (Fed. Cir. 1986) (en banc), *cert. denied,* 479 U.S. 1030 (1987). Although hearings on Senate Bill No. 2461 were held in both the Senate and the House of Representatives, the 91st Congress adjourned without considering it further. *See Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ.,* 772 F.2d 1123, 1127 (3d Cir. 1985). In September 1971, a similar bill, Senate Bill No. 2506, was introduced in the 92d Congress. *Id.* However,

> Congress requested the General Accounting Office (GAO) to review vending operations on federally-controlled property and to determine if blind vendors were receiving preference as required by the 1954 amendment[ ]. . . .
>
> The report concluded that the program was languishing at the federal level while flourishing at the state level and in the private sector. GAO found that not only has little attention been paid

> to the blind vendor program, but that major abuses had occurred[, *e.g.*, the parent Defense Department association at a major federal space installation demanded blind vendors give a portion of their income to the association; and the Department of Defense regulations, 32 C.F.R. § 260.4(b)(3)(ii) (1966), provided that no permits would be granted to blind vendors for the operation of vending stands if morale and welfare programs would be placed in jeopardy].

Texas State Comm'n for the Blind, 6 Cl. Ct. at 732-33 (footnote omitted). Consequently, another bill, Senate Bill No. 2581, which reflected some of the findings contained in the GAO's report, was introduced. *Delaware Dep't of Health & Soc. Servs.,* 772 F.2d at 1127 (citing S. 2581, 93d Cong., 1st Sess. (1973)). Eventually, House Resolution No. 14225, substantially similar to Senate Bill No. 2581, was passed and became law on November 21, 1974. *Id.* (citing Pub. L. No. 93-651, 89 Stat. 2-3 (1974)[4]).

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[4] In the 1974 amendment, Congress specifically made the following findings:

> (1) [A]fter review of the operation of the blind vending stand program authorized under the [RSA] of June 20, 1936, that the program has not developed, and had not been sustained, in the manner and spirit in which the Congress intended at the time of its enactment, and that, in fact, the growth of the program has been inhibited by a number of external forces; [and]
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> (2) . . . *[T]he potential exists for doubling the number of blind operators on Federal and other property* under the Randolph-Sheppard program within the next five years, provided the obstacles to growth are removed, that legislative and administrative means exist to remove such obstacles, and that Congress should adopt legislation to that end[.]

Pub. L. No. 93-651, § 201, 89 Stat. at 2-7 (emphasis added).

The 1974 amendment expanded the statute to increase the fair treatment of blind vendors and to provide oversight of the federal RSA's application in the federal government, among other objectives. S. Rep. No. 937, 93rd Cong., 2d Sess. 9 (1974), *reprinted in,* 1974 U.S.C.C.A.N. 6417 [hereinafter, S. Rep. No. 93-937]; *see also* Pub. L. No. 93-651, §§ 200-11, 89 Stat. 2-3, 2-7 to 2-16 (1974). The 1974 amendment, in part, resulted in giving blind vendors *priority* (as opposed to preference) to operate vending facilities on federal property. 20 U.S.C. § 107(b). Thus, in sum and as more succinctly described by the United States Court of Appeals for the Sixth Circuit in *Tennessee Department of Human Services v. United States Department of Education,* 979 F.2d 1162 (6th Cir. 1992):

> The [federal RSA] grants priority to those blind persons who desire to operate vending facilities on federal property. 20 U.S.C. § 107(b). The [federal RSA] divides responsibility for the blind vendor program between the state and federal agencies. The Secretary of Education [[hereinafter, the Secretary]], is responsible for interpreting and enforcing the [federal RSA's] provisions, and more specifically, for designating [SLAs]. 20 U.S.C. § 107a(a)(5), [§]107b; 34 C.F.R. §§ 395.5, 395.8. A person seeking a position as a blind vendor applies to the designated state agency and is licensed by that agency. The state agency in turn applies to the federal government for the placement of the licensee on federal property. 20 U.S.C. § 107b. Once the state and the federal government have agreed on an appropriate location for the vending facility, the [SLA] is responsible for equipping the facility and furnishing the initial stock and inventory. 20 U.S.C. § 107b(2). The blind vendor thereafter

> operates as a sole proprietor who is entitled to the profits of the vending facility and who is responsible for the facility's losses.

Id. at 1163-64.

The 1974 amendment also revised the remedial scheme for aggrieved blind vendors. *See* Pub. L. No. 93-561, §§ 204, 206, 89 Stat. at 2-10 to 2-11, codified at 20 U.S.C. §§ 107b(6) and 107d-1; S. Rep. No. 93-937. At that time, in addition to the 1954-requirement that participating states provide dissatisfied blind licensees "an opportunity for a fair hearing," Pub. L. No. 83-565, § 4, 68 Stat. at 664, codified at 20 U.S.C. § 107b(6), Congress imposed the additional requirement that participating states "*agree to submit the grievances of any blind licensee not otherwise resolved by [the fair] hearing to arbitration* as provided in section 5 of this Act [20 U.S.C. § 107d-1]." Pub. L. No. 93-651, § 204, 89 Stat. at 2-10, codified at 20 U.S.C. § 107b(6) (emphasis added). The term "fair hearing" was defined as "a full evidentiary hearing" in section 5(a) of the 1974 amendment, which states:

> Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a [SLA] a request for *a full evidentiary hearing,* which shall be provided by such agency in accordance with section 3(6) of this Act [*i.e.,* 20 U.S.C. § 107b(6)].

Pub. L. No. 93-651, § 206, 89 Stat. at 2-11, codified at 20 U.S.C. § 107d-1(a) (emphasis added). Additionally, Section 5(a) provides that:

> If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may *file a complaint with the Secretary who shall convene a panel to arbitrate the dispute* pursuant to section 6 of this Act [*i.e.*, 20 U.S.C. § 107d-2], and the decision of such panel shall be final and binding on the parties except as otherwise provided in this Act.

Id. (emphasis added). Section 6(a) of the 1974 amendment provides in relevant part:

> Such [arbitration] panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision *which shall be subject to appeal and review as such final agency action for purposes of chapter 7 of Title 5.*

Id., codified at 20 U.S.C. § 107d-2(a) (emphasis added). The reference to chapters 5 and 7 of Title 5 are to the administrative procedures and judicial review provisions of the Administrative Procedure Act (APA).[5]

Thus, in sum, the remedial scheme mandated by the 1974 amendment include: (1) a full evidentiary hearing at the state level before the SLA; (2) an opportunity to appeal the SLA decision to the USDOE for review by an arbitration panel; and, finally, (3) judicial review of the USDOE's arbitration panel decision in the federal courts [hereinafter, collectively, the federal adjudication path].

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[5] Section 706 of 5 U.S.C. permits the reviewing court to set aside agency adjudicative actions which are, *inter alia*, "arbitrary, capricious, an abuse of discretion or otherwise not in accordance to law," or "unsupported by substantial evidence."

Pub. L. No. 93-561, §§ 204, 206, 89 Stat. at 2-10 to 2-11, codified at 20 U.S.C. §§ 107b(6), 107d-1, and 107d-2(a).

2. The Hawai'i Randolph-Sheppard Act

As previously stated, the Hawai'i RSA, consisting of HRS §§ 102-14 and 347-12 and their implementing regulation, HAR § 17-402-17, is modeled after the federal RSA and applies to state and county properties.[6] HRS § 102-14 provides in relevant part:

> **§ 102-14 Use of public buildings by blind or visually handicapped persons.** (a) For the purpose of providing blind or visually handicapped persons, as defined in sections 235-1, 347-1, and 347-2[,] with remunerative employment, enlarging their economic opportunities and stimulating them to greater efforts in striving to make themselves self-supporting, blind or visually handicapped persons registered by [DHS] under section 347-6 and issued permits under subsection (c) shall be authorized to operate vending facilities and machines in any state or county public building[.]
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> (b) [DHS], after consultation with authorities responsible for management of state or county public buildings, shall adopt rules in accordance with [C]hapter 91, necessary for the implementation of this section, including, but not limited to rules to assure that priority be given to registered blind

[6] The Hawai'i RSA was originally enacted in 1937. 1937 Haw. Sess. L. Act 208, § 1. Prior to a 1981 amendment, the Hawai'i RSA, like the federal RSA, gave blind vendors a "preference" regarding the operation of vending facilities on state and county properties. In 1981, the statute was amended consistent with its federal counterpart to provide blind vendors "priority" status.

or visually handicapped persons in the operation of vending facilities in state or county public buildings and to establish, whenever feasible, one or more vending facilities in all state and county public buildings.

(c) Assignments of vending facilities and space for vending machines shall be by permit issued by [DHS].

(d) No person shall advertise or otherwise solicit the sale of food or beverages for human consumption in any public building which is in competition with a vending facility or machines operated or maintained by a duly authorized blind or visually handicapped person. . . .

(e) After July 1, 1981, or upon the expiration of vending machine contracts in existence on June 10, 1981, no vending machines shall be placed in any state or county public building in which there is a vending facility or machine assigned by permit to a blind or visually handicapped person except pursuant to a permit issued by [DHS].

(Bold emphasis in original.) HRS § 347-12.5 states:

[§ 347-12.5] Randolph-Sheppard revolving account.

(a) There is established within the state treasury the [RSR] [A]ccount. The revolving account shall be used by [DHS] for:

(1) The provision of the following benefits for blind vendors:

(A) A retirement or pension plan;

(B) Health insurance; and

(C) Sick and vacation leave;

(2) The maintenance and replacement of equipment used in the blind vending program;

(3) The purchase of new equipment to be used in the blind vending program;- and

(4) The provision of management services, which shall include, but not be limited to:

(A) The hiring of consultants;

(B) The sponsoring of training seminars;

(C) Transportation;

(D) Per diem for vendors to attend meetings of the state committee of blind vendors;

(E) Services for the state committee of blind vendors; and

(F) Other costs related to the blind vending program.

(b) Income from vending machines on federal, state, and county properties that are within reasonable proximity to, and in direct competition with, a blind vendor may be deposited into the account and then disbursed to the blind vendor.

(c) The revolving account shall consist of funds derived from:

(1) Vending machine income generated by federal, state, and county operations;

(2) Any other legally accepted source of income; and

(3) Donations.

(Bolded text in original.) HAR § 17-402-17(j) provides:

(j) Evidentiary hearings and arbitration of vendor complaints shall be provided for in the following manner:

(1) Each vendor shall have the right and opportunity to assert [a] claim and to secure, in an informal administrative proceeding, review of a grievance or dissatisfaction with a decision made or action taken. This shall be in accordance with the State's vocational rehabilitation rules and standards.

(2) Each vendor or a personal representative or next of kin shall be given an opportunity for a full and fair hearing if [the] vendor is dissatisfied with any action arising from the operation or administration of the vending facility program. Such requests for a hearing shall be submitted in writing to the director.

(3) A vendor shall have the right to be represented at the hearing by counsel or other representative.

(4) The hearing shall be held in a place and time convenient to the vendor, personal representative or next of kin. There shall be notice to the vendor at least two weeks in advance, giving the date, time, and place of hearing.

(5) The vendor shall have an adequate opportunity to present the case and to be cross-examined.

(6) The hearing shall be held before the director or a designated agent. Authority to make the final decision based upon the record of the hearing shall be exercised by the department.

(7) The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and reports filed in the proceedings, and the hearing officer's recommendation, shall constitute the exclusive record for decision and shall be made available to the vendor at any reasonable time.

(8) The decision shall set forth the issue, principle, and relevant facts brought out at the hearing, the pertinent provisions in law, agency policy and the reasoning that led to the decision. The individual shall be forwarded a copy of the section or shall be advised in writing of the content.

(9) The vendor shall be informed of the right to request the [Secretary] to convene an ad hoc arbitration panel, if the vendor is dissatisfied with any action taken or decision rendered as a result of the full evidentiary hearing.[7]

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[7] The current version of HAR § 17-402-17 (which recognizes the federal adjudication path) was adopted in 1981. The 1981 amendment replaced section 5, entitled "Fair Hearing," of Rule 9 of the "Department of Social Services Rules and Regulations for Vending Stand Program for the Blind on Federal and Other Property" that was originally promulgated in 1971. As originally promulgated, section 5 provided in relevant part:

> 5.1. Each operator or his personal representative or next of kin shall be given an opportunity for a *full and fair hearing* if he is dissatisfied with any action arising from the operation or administration of the Business

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(Bold emphasis in original.) (Underscored emphases added.)

Consequently, in Hawai'i, blind persons enjoy not only the benefits provided by the federal RSA, but also analogous benefits conferred by state law. In essence, the Hawai'i RSA affords blind persons vending opportunities on state and county properties similar to the opportunities afforded by its federal counterpart, 20 U.S.C. §§ 107 to 107f, with respect to federal properties, *see* HRS § 102-14(b), and provides a grievance procedure for vendor complaints, discussed *infra*. HAR § 17-402-12(j)(2) through (9). The Hawai'i RSA further establishes the RSR Account, in which income generated from vending machines on federal, state, and county properties within the state of Hawai'i that "are within reasonable proximity to, and in direct competition with, a blind vendor may be deposited" and "disbursed to the blind vendor." HRS § 347-12.5(b).

B. Factual and Procedural Background

The following undisputed facts and procedural history are relevant to our resolution of this appeal.

1. Events Leading to Litigation

Sometime in or around March 1995, it came to the attention of the plaintiffs that the City was not making

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Enterprise Program [(now known as the Vending Facility Program)]. . . .

(Emphasis added.) Inasmuch as the mandate to adhere to the federal adjudication path was not established until 1974, *see* Pub. L. No. 93-651, §§ 204, 206, 89 Stat. at 2-10, 2-11, section 5 of Rule 9 did not, obviously, contain any reference to it.

space in its public buildings for vending machines under the control of blind vendors, in violation of the Hawai'i RSA. Instead, the City had placed its own leased machines in such locations and kept the proceeds for its own use. DHS, serving as Hawaii's SLA,[8] sent written requests to county property managers to place blind vendor vending machines in county buildings on several occasions, but such requests were ignored, and DHS did nothing further.

Between mid-1995 to early 1996, plaintiffs and/or representatives on their behalf attempted to secure the City's voluntary compliance with the law by (1) making space available in its public buildings for blind vendor machines or (2) paying the State defendants, specifically, DHS, on behalf of the blind vendors, all the monies collected from the alleged unauthorized and illegal vending machines it controlled in its public buildings, but to no avail.

Eventually, on February 13, 1996, the Hawai'i State Committee for Blind Vendors, on behalf of blind vendors, including the plaintiffs, filed with DHS a request for a declaratory ruling "as to whether HRS § 102-14 and its implementing regulations authorize [DHS] to place

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[8] As previously indicated in *supra* note 7, the adoption of the federal adjudication path within HAR § 17-402-17(j) was made in 1981 after the federal RSA was amended to include such requirement. DHS, thereafter, applied to the USDOE to become an SLA on February 25, 1982. Its application contained, *inter alia*, the signature of then-director of DHS, Franklin Y.K. Sunn, and the chief executive of the State, George R. Ariyoshi, along with an attachment of the rules and regulations, as amended, for the USDOE's approval. On April 15, 1982, the USDOE approved DHS's application for "redesignation as the [SLA] under the [federal RSA] as amended."

[vending] machines in buildings where the agency head or building manager objects." DHS did not respond.

2. Circuit Court Proceedings

On July 22, 1996, the plaintiffs filed the instant action against the State defendants and the City for their alleged failure to enforce and comply with the requirements of the Hawai'i RSA. On August 19, 1996, the State defendants filed their motion to dismiss the complaint or, in the alternative, to stay proceedings pending the disposition of the declaratory ruling from the DHS. On August 29, 1996, the City joined the State defendants' motion to dismiss. On November 7, 1996, the circuit court stayed the action to allow for administrative handling of the request for a declaratory ruling.

Thereafter, on June 6, 1997, then-DHS Director Susan Chandler, apparently without conducting a full evidentiary hearing, issued a decision and order, basically agreeing with the long-asserted position of the plaintiffs that, "[p]ursuant to sections 102-14 and 347-12.5, together with the implementing regulations, [DHS] has authority to control both the placement of vending machines in all state and county public buildings and the income derived therefrom." In other words, DHS has the authority to lawfully place vending machines on City property without the assent of the City.[9]

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[9] Although not relevant to the instant appeal, the City, on July 9, 1997, filed a Notice of Appeal to the First Circuit Court, pursuant to HRS § 91-14 (1993), appealing the June 6, 1997 decision and order of Director Chandler. The case was captioned *City and County of Honolulu v. Susan Chandler,* Civil No. 97-2827-07. Shortly after, the County of

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In June 1999, the plaintiffs entered a settlement with the City.[10] On July 15, 1999, the circuit court approved the settlement and granted the parties' request to maintain the action as a class action.

On August 2, 2000, a jury-waived trial commenced to determine two main issues: (1) the extent of loss and the amount of damages; and (2) declaratory and equitable relief. The trial lasted four days from August 2 through 4 and 8, 2000. On September 27, 2000, the trial court, *inter alia,* entered judgment in favor of the plaintiffs in the amount of $3,676,922.

3. The First Appeals

The State defendants and the plaintiffs both appealed the September 27, 2000 judgment, which appeals were docketed as appeal Nos. 23843 and 23997, respectively. This court, however, dismissed both appeals on February 5, 2001 and March 14, 2001, respectively, for lack of appellate jurisdiction because no dismissal or judgment of the plaintiffs' claims against the City had been filed.

Hawai'i filed a separate administrative appeal of the June 6, 1997 decision in the Third Circuit Court, styled *County of Hawai'i v. Susan Chandler,* Civil No. 97-3201. Upon the request of DHS, the two administrative appeals were consolidated. Upon the request of the plaintiffs, the consolidated administrative appeal was ultimately consolidated with the plaintiffs' case on October 21, 1997.

[10] The City, *inter alia,* agreed to (1) remove and replace all non-blind vendor vending machines on its properties, (2) pay the amount of $150,000, and (3) dismiss its administrative appeal. Additionally, the parties agreed to obtain a commitment from the County of Hawai'i to dismiss its administrative appeal. On October 12, 1999, both administrative appeals were dismissed.

4. Post-First Appeal Proceedings

On February 6, 2001, after their initial appeal had been dismissed, the State defendants filed a motion to dismiss at the trial level, asserting for the first time that the circuit court lacked subject matter jurisdiction. The State defendants argued that: (1) the terms and conditions of the State's consent to be sued define and restrict the court's jurisdiction; and (2) the court has no jurisdiction because the terms and conditions of the consent to suit require plaintiffs to pursue a full and fair evidentiary hearing, followed, if necessary, by arbitration under the auspices of the federal Secretary of Education, followed, if necessary, by an appeal, pursuant the federal APA, as mandated by HAR § 17-402-17(j). The plaintiffs, on the other hand, argued, *inter alia,* that this court, in *Hawai'i Blind Vendors Association v. Department of Human Services,* 71 Haw. 367, 791 P.2d 1261 (1990), had already determined that "concurrent original jurisdiction" vested authority in both the court and the agency, *i.e.,* DHS. *Id.* at 371, 791 P.2d at 1264. The plaintiffs, therefore, asserted that "there is no question that the court has subject matter jurisdiction."

A hearing on the motion to dismiss was held on March 27, 2001. At the hearing, the State defendants again argued that they "had to waive [their] immunity the way the federal government told [them to in order] to be a participating state licensing agency and to receive federal money," *i.e.,* by adopting the federal adjudication path in the HAR. The plaintiffs essentially contended that "the grievance procedures in the [federal RSA] were not intended to and do not control how [the] State administers [its] own State laws relating to vending facilities on state and county properties." On April 18, 2001, the circuit court

denied the motion, ruling that the prior order denying the State defendants' motion for summary judgment on sovereign immunity grounds[11] is the law of this case "unless there exist cogent reasons to defer from it, and this [c]ourt does not find any such cogent reasons exist."

On August 22, 2001, the circuit court entered a final judgment. The August 22, 2001 final judgment essentially provides that: (1) as between the plaintiffs and the City, the July 15, 1999 order was entered in favor of the plaintiff and against the City in accord with the settlement agreement between them; (2) as between the plaintiff and the State defendants, judgment as to liability was entered in favor of the plaintiffs on March 14, 2000; and (3) the remaining non-liability issues were tried to the court in August 2000, in which the court entered its FOFs and COLs on September 27, 2000, adjudging that (a) the plaintiffs would be awarded $3,676,922.00 and (b) "declaratory and other equitable relief shall be entered." Consequently, "[a]ll claims as to all parties have been adjudicated." The circuit court also entered a separate Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) (2005)[12] judgment concerning the plaintiffs' previously undismissed claims against the City.

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[11] On January 6, 2000, the State defendants had moved for summary judgment on the ground that they are immune from suit under the doctrine of sovereign immunity, which was denied by the court, the Honorable Linda K.C. Luke presiding, on January 25, 2000.

[12] HRCP Rule 54 provides in relevant part:

> (b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties

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Thereafter, on September 19, 2001, the State defendants appealed from the August 22, 2001 judgment. On September 20, 2001, the plaintiffs cross-appealed from the final judgment.

II. STANDARDS OF REVIEW

A. Subject Matter Jurisdiction

The circuit court's authority to hear the instant matter and, in turn, this court's authority to review the circuit court's rulings are questions of subject matter jurisdiction. "Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*." *Hawai'i Mgmt. Alliance Ass'n v. Ins. Comm'r,* 106 Hawai'i 21, 26, 100 P.3d 952, 957 (2004) (internal quotation marks and citation omitted); *see also Int'l Bhd. of Painters & Allied Trades, Local Union 1944 v. Befitel,* 104 Hawai'i 275, 281, 88 P.3d 647, 653 (2004) ("Subject matter jurisdiction is concerned with whether the court has the power to hear a case." (Internal quotation marks and citation omitted.)). We further note that:

> The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, a court *sua sponte* will, for

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only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any . . . form of decision . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties[.]

(Emphasis in original.)

> unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid.

Chun v. Employees' Ret. Sys. of the State of Hawai'i, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (citation and internal quotation marks omitted). When reviewing a case to determine whether the circuit court has jurisdiction, we "retain[] jurisdiction, not on the merits, but for the purpose of correcting the error in jurisdiction." *Amantiad v. Odum,* 90 Hawai'i 152, 159, 977 P.2d 160, 167 (1999) (citation omitted).

B. Statutory Interpretation

"The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews *de novo.* Where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning." *Liberty Mut. Fire Ins. Co. v. Dennison,* 108 Hawai'i 380, 384, 120 P.3d 1115, 1119 (2005) (quoting *Labrador v. Liberty Mut. Group,* 103 Hawai'i 206, 211, 81 P.3d 386, 391 (2003)) (internal quotation marks omitted). "Additionally, the general principles of construction which apply to statutes also apply to administrative rules." *Brown v. Thompson,* 91 Hawai'i 1, 9, 979 P.2d 586, 594 (1999) (citation and internal quotation marks omitted).

III. DISCUSSION

A. Subject Matter Jurisdiction

As a threshold matter, the State defendants argue that the circuit court lacked subject matter jurisdiction because the federal adjudication path – *i.e.,* a full and fair

evidentiary hearing by the SLA, arbitration conducted by the USDOE panel, and appeal and final review by the federal courts – was imported into the Hawai'i RSA through HAR § 17-402-17(j). The State defendants argue that "[t]he arbitration required by the [federal] [a]djudication [p]ath is the *mandatory, exclusive, statutory* arbitration provision required by the [federal] RSA and the HAR and *is not subject to circumvention.*" (Some emphases added.) The State defendants, therefore, submit that the state judiciary does not have jurisdiction over this case. The plaintiffs, however, respond that the federal adjudication path has no application in this case because the remedial path is associated with the federal RSA, which involves solely "vending facilities on federal property." The plaintiffs further maintain that this court has subject matter jurisdiction over the instant case because this court asserted its jurisdiction in *Hawai'i Blind Vendors Association v. Department of Human Services,* 71 Haw. 367, 791 P.2d 1261 (1990), wherein this court specifically stated that DHS and the circuit court "have concurrent original jurisdiction." *Id.* at 371, 791 P.2d at 1264.

Inasmuch as we are guided by the principle that, "[i]f a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid [and that,] therefore, such a question is valid at any stage of the case," *Bush v. Hawaiian Homes Comm'n,* 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994) (citation, internal quotation marks and brackets omitted), this court is obliged to first insure that it has jurisdiction. *Id.; see also* HRCP Rule 12(h)(3) (2005) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss

the action".). Accordingly, we must examine the overall scheme of the federal RSA and its relationship to the Hawai'i RSA to determine whether the federal adjudication path applies to state and county properties, thereby depriving the circuit court of jurisdiction.

1. The Federal RSA

We begin with the federal RSA. As previously stated, "the [federal RSA] provides the framework for a comprehensive regulatory scheme giving *blind persons* licensed by *state agencies* priority to operate vending facilities on all federal property." *Minnesota, Dep't of Jobs & Training v. Riley,* 18 F.3d 606, 608 (8th Cir. 1994) (citing 20 U.S.C. § 107(a)-(b)) (emphases added). "The blind vendors became, in effect, third party beneficiaries of the agreements between the participating states and the federal government." *Delaware Dep't of Health & Soc. Servs.,* 772 F.2d at 1127.

States that choose to have their agencies become SLAs and participate in and administer the program must agree to several conditions enumerated in the federal RSA. Preliminarily, we note that, pursuant to 20 U.S.C. § 107a(a)(6)(B), the USDOE is mandated, "[t]hrough the Commission[er of the Rehabilitation Services Administration]," to "take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the provisions of this chapter." Consequently, section 395 of Title 34 of the Code of Federal Regulations was promulgated and sets forth the requirements for states to become designated SLAs. Section 395.3, entitled "Application for designation as [SLA]; content," provides in pertinent part:

(a) An application for designation as a [SLA] under § 395.2[13] shall indicate:

(1) *The [SLA's] legal authority to administer the program, including its authority to promulgate rules and regulations to govern the program*;

(2) The [SLA's] organization for carrying out the program, including a description of the methods for coordinating the State's vending facility program and the State's vocational rehabilitation program[;]

. . . .

(7) The policies and standards governing the relationship of the [SLA] to the vendors, including their selection, duties, supervision, transfer, promotion, financial participation, *rights to a full evidentiary hearing concerning a [SLA] action, and, where necessary, rights for the submittal of complaint to an arbitration panel.*

. . . .

(11) *The assurance of the [SLA] that it will*:

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[13] Section 395.2 provides that:

(a) An application for designation as a [SLA] may be submitted only by the State vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan for vocational rehabilitation services under Part 1361 of this chapter.

(b) Such application shall be:

(1) Submitted in writing to the Secretary;

(2) *Approved by the chief executive of the State*; and

(3) Transmitted over the signature of the administrator of the State agency making application.

(Emphasis added.)

. . . .

> (iii) Submit promptly to the Secretary for approval a description of any changes in the legal authority of the [SLA], its rules and regulations[;]
>
> . . . .
>
> (vii) *Submit to an arbitration panel those grievance* [sic] *of any vendor unresolved after a full evidentiary hearing*[.]

(Emphases added.) Section 395.4, in turn, obligates the SLAs to "promulgate rules and regulations which have been approved by the Secretary and which shall be adequate to assure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings)[.]" Finally, Section 395.13 indicates, *inter alia,* that:

> (a) The [SLA] shall specify in writing and maintain procedures whereby such agency affords an opportunity for a full evidentiary hearing to each blind vendor . . . dissatisfied with any [SLA] action arising from the operation or administration of the vending facility program. When such blind vendor is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary. . . .

Moreover, notwithstanding the above promulgated rules, Congress, in enacting the federal RSA, also included the following sections:

§ 107b. Application for designation as [SLA]; cooperation with Secretary; furnishing initial stock.

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall[ ] ... make application to the Secretary and agree –

. . . .

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) *to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration* as provided in **section 107d-1** of this title.

(Emphases added.) Section 107d-1(a) provides in relevant part:

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a[n SLA] a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. *If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to* ***section 107d-2*** *of this title*, and the decision of such panel shall

> be final and binding on the parties except as otherwise provided in this chapter.

20 U.S.C. § 107d-1(a) (emphases added). Section 107d-2, entitled "Arbitration," states in pertinent part:

> *Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel* as provided in subsection (b) of this section.[14] *Such panel shall*, in accordance with the provisions of subchapter II of chapter 5 of Title 5[, *i.e.*, the APA, *see supra* note 5], *give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action* for purposes of chapter 7 of such Title 5.

20 U.S.C. § 107d-2 (emphases added).

Accordingly, taking into account the federal RSA and its regulations, we believe that, although states are not required to participate in the vending facility program, those that desire to gain access to federal properties to establish vending facilities for their blind vendors to

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[14] Subsection (b) of section 107d-2 provides in relevant part:

> (1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:
>
> (A) one individual designated by the [SLA];
>
> (B) one individual designated by the blind licensee; and
>
> (C) one individual, not employed by the [SLA] or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).
>
> If any party fails to designate a member under subparagraph (1)(A), (B), or (C), the Secretary shall designate such member on behalf of such party.

operate must submit a state vending facility plan that conforms with the requirements of the federal RSA and its regulations. In turn, the language in each of the above provisions is clear: for a state agency to become an SLA and participate in the federal RSA program, it must agree to the federal adjudication path in dealing with blind licensees who are dissatisfied with the operation of the vending program. *See Comm. of Blind Vendors of the Dist. of Columbia v. Dist. of Columbia,* 28 F.3d 130, 135 (D.C. Cir. 1994) ("The inclusion of a detailed grievance procedure to resolve vendor disputes . . . is the strongest evidence of Congressional intent" that aggrieved vendors pursue their administrative remedies before resorting to judicial adjudication.); *see also Randolph-Sheppard Vendors of America v. Weinberger,* 795 F.2d 90, 103 (D.C. Cir. 1986). In consideration of the states' agreements to subject themselves to the federal adjudication path, the federal government grants to state agencies the right to place licensed blind vendors on federal sites and to receive federal funds, as discussed *infra. See Ramsey,* 366 F.3d at 6; *Delaware Dep't of Health & Soc. Servs.,* 772 F.2d at 1127.

We fully recognize that the federal RSA, as previously mentioned, involves the operation of a "vending facility on **any [f]ederal property**." 20 U.S.C. § 107(a) (emphasis added). Thus, on its face, it appears that DHS is obligated to comply with the federal adjudication path only with respect to claims relating to its management of vending machines on *federal* property. However, in our view, it is the *overall scheme of the federal RSA* that dictates adherence to the federal adjudication path even in those situations involving non-federal property. *See* 34 C.F.R. § 395.

As previously noted, section 107a(a)(5) authorizes the Secretary to designate to the state agency in each state the responsibility of issuing "licenses to blind persons . . . for the operating of vending facilities on *Federal and other property* in such [s]tate[.]" 20 U.S.C. § 107a(a)(5) (emphasis added). Although Congress clearly intended the RSA program to apply to both federal and non-federal properties, *see also supra* note 4, the phrase "other property" is not defined anywhere in the federal RSA, *i.e.*, 20 U.S.C. §§ 107 through 107f, including the pertinent definition section, 20 U.S.C. § 107e. However, because Congress has delegated to the Secretary the power to "prescribe regulations designed to assure[, *inter alia,*] that – (1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority)," 20 U.S.C. § 107(b), "we must defer to his regulatory interpretations of the Code so long as they are reasonable." *Cottage Sav. Ass'n v. Comm'r of Internal Revenue,* 499 U.S. 554, 560-61 (1991) (citation omitted). The term "other property" is specifically defined within section 395 of the Code of Federal Regulations, entitled "Vending Facility Program For the Blind on Federal and *Other Property,*" (emphasis added), as "property which is not [f]ederal property *and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any [f]ederal property.*" 34 C.F.R. § 395.1(n) (emphasis added). We note that, although

> [t]he principal benefit that a state receives for participating in the program is an opportunity to improve the lot of its blind population[, a] participating state also receives funds. For

> example, even if no blind vendor operates vending facilities on a particular federal property, *the relevant SLA receives income from vending machines on that property; these proceeds can be used to fund retirement, health insurance, sick leave, and vacation time for blind vendors and to defray various costs associated with running the program.* 20 U.S.C. §§ 107d-3(a), (c).

Ramsey, 366 F.3d at 6 (emphasis added). Section 107d-3 expressly provides that

> vending machine *income* obtained from the operation of vending machines on [f]ederal property *shall accrue* (1) to the blind licensee operating a vending facility on such property, or (2) *in the event there is no blind licensee operating such facility on such property, to the [SLA] in whose State the [f]ederal property is located*[.]

20 U.S.C. § 107d-3 (emphases added). Thus, if funds derived from the operation of vending facilities on any federal property are used to establish or operate a blind vendor facility on non-federal property, the provisions of the federal RSA apply. In other words, "[m]anifestation of a state's willingness to enter the program, which applied to both federal and 'other buildings in [the] [s]tate,' required that the [SLA] 'make application to the [Secretary] and agree' to federal requirements." *Delaware Dep't of Health & Soc. Servs.,* 772 F.2d at 1126 (some brackets in original and some added) (quoting Pub. L. No. 74-732, 49 Stat. 1559).[15]

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[15] The phrase "federal and other *buildings*" was amended to "federal and other *property*" in the 1954 amendment. Pub. L. No. 83-565, § 13, 68 Stat. at 663 (emphases added). The revision was made

(Continued on following page)

Based on the foregoing, we believe that the federal RSA mandates that the participating states, like Hawai'i, acknowledge and accept the federal adjudication path. Review of the Hawai'i RSA further confirms our conclusion. We, therefore, turn our attention to the Hawai'i RSA.

2. The Hawai'i RSA

Preliminarily, we note that the legislature devoted HRS chapter 347 to blind and visually handicapped persons, wherein it generally authorizes DHS to

> *administer work with and for the blind, including* the registry of the blind, vocational guidance, training, and *placement in employment*[.]

HRS § 347-3 (1993) (emphases added). Under this chapter, DHS is specifically required to

> *provide vocational rehabilitation for blind and visually handicapped persons* ***in accordance with the provisions of the federal Vocational Rehabilitation Act [(VRA)] and the Randolph-Sheppard Act [(VRA)] and the Randolph-Sheppard Act*** and in accordance with chapter 348[, which governs the state's vocational rehabilitation program], to the extent permitted by the amount appropriated, funds available from the federal government, and other donations, and grants.

HRS § 347-4 (1993) (emphases added).[16]

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to allow blind vendors to establish vending stands in locations that "would not have been encompassed" under the phrase "federal and other buildings." *See* S. Rep. No. 93-937 at 6.

[16] Vocational rehabilitation, accordingly [sic] to the federal VRA, includes, *inter alia*, "increas[ing] employment of individuals with disabilities."

As indicated *supra,* Congress conditioned a state's participation in the federal RSA program upon, *inter alia,* adherence to the federal adjudication path. As mandated by section 107b(6), the state agency making application to the Secretary must agree to, *inter alia,*

> provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration[.]

20 U.S.C. § 107b(6). DHS applied to the Secretary to become an SLA on February 25, 1982. In so doing, DHS agreed to the above condition as evinced by the "[r]ules [g]overning the [v]ending [f]acility [p]rogram," *i.e., inter alia,* HAR § 17-402-17, which were attached to the application. *See supra* note 8.

Section 395.3 of the Code of Federal Regulations explicitly provides that a state's application for designation as an SLA must contain, *inter alia*:

> (1) The [SLA's] *legal authority to administer the program, including its authority to promulgate rules and regulations* to govern the program;
>
> (2) The [SLA's] organization for carrying out the program, *including a description of the methods for coordinating the State's vending facility program and the State's vocational rehabilitation program*[.]

34 C.F.R. § 395.3(a) (emphases added). The "legal authority to administer the program" and "description of the methods for coordinating the State's vending facility

program" are found in HRS §§ 102-14 and 347-12.5 and HAR § 17-402-17. Further, as a condition to being licensed as SLAs, states must agree to conduct full evidentiary hearings on any complaint arising from the operation or administration of the blind vendor program and to submit to arbitration before a USDOE panel convened by the Secretary, if requested by a dissatisfied vendor. *See* 20 U.S.C. §§ 107b(6) and 107d-1(a); 34 C.F.R. § 395.3(a). Section 395.4 further provides that "[t]he [SLA] shall promulgate rules and regulations *which have been approved by the Secretary and which shall be adequate to assure the effective conduct of the State's vending facility program* (including [SLA] *procedures covering the conduct of full evidentiary hearings*)[.]" (Emphases added.)

The "rules and regulations" referred to above are found in HAR § 17-402-17, promulgated pursuant to HRS § 102-14(b) (DHS "shall adopt rules in accordance with [C]hapter 91, necessary for the implementation of this section, including, but not limited to rules to assure that priority be given to registered blind [vendors]"). As previously quoted, HAR § 17-402-17(j) provides in pertinent part that:

> Evidentiary hearings and arbitration of vendor complaints shall be provided for in the following manner:
>
> (1) *Each vendor shall have the right and opportunity to assert [a] claim and to secure, in an informal administrative proceeding, review of a grievance or dissatisfaction with a decision made or action taken. This shall be in accordance with the State's vocational rehabilitation rules and standards.*

> (2) *Each vendor or a personal representative or next of kin shall be given an opportunity for a full and fair hearing if [the] vendor is dissatisfied with any action arising from the operation or administration of the vending facility program. Such requests for a hearing shall be submitted in writing to the director.*
>
> . . . .
>
> (9) *The vendor shall be informed of the right to request the [Secretary] to convene an ad hoc arbitration panel, if the vendor is dissatisfied with any action taken or decision as a result of the full evidentiary hearing.*

(Emphases added.) By its plain language, the first step in the Hawai'i RSA's procedure for the resolution of disputes is an informal administrative proceeding conducted pursuant to "the State's vocational rehabilitation rules and standards." HAR § 17-402-17(j)(1). The vocational rehabilitation rule concerning complaints and fair hearings under that program is found in HAR § 17-400-4(d).[17] The rule, however, provides in relevant part that:

> The administrative review is *not a prerequisite* to the fair hearing process:
>
> (1) Administrative review shall be an informal procedure which may include the applicant or client or representative, conducted by the [vocational rehabilitation and services for the blind] division's [[hereinafter, the division]]

[17] HAR § 17-400-4 was promulgated pursuant to the authority provided in HRS § 348-6 (1993).

> supervisory or administrative staff, or both,[18] at the request of the applicant or client or their parent, guardian or representative. This request may be made orally or in writing.

(Emphasis added.) The administrative review, therefore, is not a precondition to a full evidentiary hearing before the SLA. Consequently, the full and fair hearing set forth in HAR § 17-402-17(j)(2) is the initial mandatory procedure. "[I]f the vendor is dissatisfied with any action taken or decision as a result of the full evidentiary hearing[,]" the administrative rule requires that the SLA inform the complainant (*i.e.*, vendor) of "the right to request the [Secretary] to convene an ad hoc arbitration panel[.]" HAR § 17-402-17(j)(9). Thus, the next stage of the dispute resolution procedures under the Hawai'i RSA program is essentially an appeal to the Secretary, who, in turn, convenes an ad hoc arbitration panel to review the concerns raised by the dissatisfied vendor.[19]

By becoming an SLA and participating in the RSA program, Hawai'i – like California – agreed to comply with the federal adjudication path for its blind vendors' grievances. In a California case, reviewed by the United States Court of Appeals for the Ninth Circuit, the court was confronted with the issue of the enforceability of the USDOE arbitration panel's award against the state.

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[18] DHS is "the sole state agency to administer the vocational rehabilitation program." HAR § 17-400-2; *see also* HRS § 348-3. The division is "the designated administrative unit of [DHS] to administer the vocational rehabilitation program in the State[.]" HAR § 17-400-2.

[19] As previously stated, 20 U.S.C. § 107d-2(a) provides that the decision rendered by the arbitration panel "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5" by the federal courts.

Premo v. Martin, 119 F.3d 764, 766 (9th Cir. 1997), *cert. denied,* 522 U.S. 1147 (1998). Although the property involved is controlled by the federal government and the issue related to the enforcement of an arbitration award, the Ninth Circuit's analysis of the federal RSA as it relates to the California's RSA is relevant and instructive:

> The State of California has not expressly consented to suit. Nor has California enacted a statute that provides for waiver. *The California statute establishing the state counterpart to the federal [RSA] does provide that the decision of an arbitration panel "shall be final and binding on the parties except as otherwise provided in the act."* Cal. Welf. & Inst. Code § 19635 (West 1991).[20] While this statute clearly reflects California's intent to be bound by Randolph-Sheppard arbitral awards, it does not provide clear enough consent to suit in federal court to amount to an express statutory waiver of sovereign immunity.
>
> However, *the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming.* The statute explicitly requires participating states to agree to a number of conditions. Specifically, each state agency "shall ... agree" to provide any dissatisfied blind vendor with the opportunity for a fair hearing and "to submit the grievances of

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[20] Section 19635 specifically provides in relevant part that:

> If [a] blind vendor is dissatisfied with any action taken or decision rendered as a result of [a full evidentiary] hearing, he may filed [sic] a complaint with the Secretary ... who shall convene a panel to arbitrate the dispute pursuant to Section 6 of the Randolph-Sheppard Act[, *i.e.,* 20 U.S.C. § 107d-2.]

> any blind licensee not otherwise resolved by such hearing to arbitration." 20 U.S.C. § 107b. The state further provides that arbitration "*shall be final and binding on the parties.*" 20 U.S.C. § 107d-1(a) (emphasis added). . . .
>
> *Under the circumstances, there is no "room for any other reasonable construction" of the statute.* ***The overwhelming implication of the statute is that[,] by agreeing to participate in the [RSA] program, states have waived their sovereign immunity to enforcement of such awards in federal courts.***

Id. at 770 (citations omitted) (emphases added). Like California, the State has incorporated the federal adjudication path into its RSA program and, in so doing, has acknowledged its obligation to the United States to conduct full evidentiary hearings at the agency level regarding blind vendor grievances and, thereafter, if requested, to submit to arbitration before a USDOE panel convened by the Secretary. Such acknowledgment is also consistent with the conditions for licensure as an SLA, discussed *supra*. In other words, by applying for and receiving the SLA designation and by issuing the regulations required by 20 U.S.C. § 107b(5), including the regulation providing the required remedies to dissatisfied vendors, *i.e.*, HAR § 17-402-17(j)(2)-(9), the State, contrary to the dissent's contention, has implicitly surrendered its sovereign immunity to suits in federal courts – not state courts – via the federal adjudication path. *See also Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 360, 133 P.3d 767, 789 (2006) ("limits on the State's waiver of sovereign immunity . . . must be strictly construed and cannot [be] extend[ed]") (internal quotation marks omitted); *Allied/Royal Parking L.P. v. United States*, 166

F.3d 1000, 1003 (9th Cir. 1999) ("limitations and conditions of consent to suit must be strictly observed and exceptions thereto are not to be implied") (citation and internal quotation marks omitted). HAR § 17-402-17, therefore, does not contradict or contravene the legislative purpose behind the Hawai'i RSA nor the purpose behind the federal RSA.[21] *See In re Wai'ola O Moloka'i, Inc.*, 103

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[21] The dissent contends that "[n]either HRS § 102-14 nor HRS § 347-12.5 can be read as delegating to the DHS the authority to divest the circuit courts of their jurisdiction over claims involving state law[,]" dissenting op. at 34; "such application of the rule would violate state law and well-established principles of agency law." Dissenting Op. at 38. Thus, the dissent maintains that, "if HAR § 17-402-17(j) attempts to divest the state courts of their jurisdiction, it is invalid." Dissenting Op. at 39. The dissent, however, fails to recognize that the Hawai'i Legislature delegated to the agencies the authority to

> accept, receive on behalf of the State, and receipt for, any and all grants or allotments for federal-aid moneys made available to the State by or pursuant to an act of Congress, and *enter into or make such* plan, *agreement*, or other arrangement *with the agency designated by the act of Congress as is necessary to carry out the purpose of the Act*[.]

HRS § 29-14 (1993) (emphases added). Specifically, with respect to the blind or visually handicapped persons:

> [DHS] may, as an agency of the State for the assistance of blind or visually handicapped persons, *do all things* which will enable the State and the blind and the visually handicapped in the State *to have the benefits of all federal laws for the benefit of blind and visually handicapped persons*.

HRS § 347-5 (1993) (emphases added). Under the federal RSA, Congress mandated states to agree to certain conditions, including the acceptance of the federal adjudication path, in order to gain access to federal properties and to obtain federal funds, which are derived primarily in the form of vending machine income from non-blind vendors' machines on federal properties, 20 U.S.C. § 107d-3. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) ("When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the States

(Continued on following page)

Hawai'i 401, 425, 83 P.3d 664, 668 (2004) ("If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." (Citation omitted.)); *see also State v. Kotis,* 91 Hawai'i 319, 331, 984 P.2d 78, 90 (1999) ("Administrative rules, like statutes, have the force and effect of law." (Citations omitted.)).

The dissent, however, asserts that the legislature "vested jurisdiction in the circuit court for a claim arising under the Hawai'i RSA," dissenting op. at 40, because it mandated that rules be adopted in accordance with HRS chapter 91, which "specifically provides for judicial relief in the circuit court for persons aggrieved by an agency declaratory ruling or a decision in a contested case." *Id.* (citing HRS § 91-7(a) (1993)) (internal quotation marks omitted). We note that the provisions contained in HRS chapter 91 can essentially be divided into two parts that authorize (1) the promulgation of rules and (2) the establishment of adjudicatory procedures. The rule-making procedures provide for, *inter alia*: (1) the adoption of rules by

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agree to comply with the federally imposed conditions." (Citation and internal quotation marks omitted.)); *see also Office of Hawaiian Affairs v. State,* 96 Hawai'i 388, 397, 31 P.3d 901, 910 (2001). Clearly, DHS was given the authority to enter into a contractual relationship with the United States to participate in the program for the benefit of the State's blind and visually handicapped persons. In turn, DHS promulgated HAR § 17-402-17 and incorporated one of the federal conditions within its rules, that is, the federal adjudication path. We note further that the USDOE, in 34 C.F.R. § 395.2(b)(2), *see supra* note 13, obligates the chief executive of the State to approve DHS's application for designation as an SLA. Here, the chief executive of the State, George R. Ariyoshi, approved DHS's application.

agencies, HRS § 91-3 (Supp. 2005); (2) the filing and effectuating of rules, HRS § 91-4 (1993); and (3) the publication of rules, HRS § 91-5 (Supp. 2005). The provisions governing the establishment of adjudicatory procedures provide for, *inter alia*: (1) declaratory rulings by agencies, HRS § 91-8 (1993); (2) contested case hearings, HRS § 91-9 (1993 & Supp. 2005); and (3) judicial review of contested cases, HRS § 91-14 (Supp. 2005).

HRS § 102-14(b) specifically states that DHS "shall adopt rules in accordance with [C]hapter 91," which the dissent maintains includes the authority to establish adjudicatory procedures of Chapter 91. However, had the legislature intended that the adjudicatory provisions of Chapter 91 be followed, it would have expressly indicated such intent as it has done in other statutes on various subjects. For instance, in enacting HRS § 174C-8 (1993), relating to the State Water Code, the legislature provided that rules concerning water resources "*shall be adopted in conformity with [C]hapter 91*," (emphasis added), mandating further that:

> All proceedings before the commission [on water resource management] concerning the enforcement or application of any provision of this chapter . . . or the issuance, modification, or revocation of any permit or license . . . *shall be conducted in accordance with [C]hapter 91*. . . .

HRS § 174C-9 (1993) (emphasis added). Similarly, other statutes demonstrate the legislature's express adoption of the rule-making and adjudicatory procedures of Chapter 91. *See, e.g.*, (1) HRS § 368-3 (Supp. 2005) (requiring the civil rights commission to "adopt rules under [C]hapter 91") and HRS § 368-14 (1993) (providing that civil rights commission hearings to be conducted in accordance with

Chapter 91); (2) HRS § 431:10B-113(a) (2005) (adopting Chapter 91's rule-making procedures for credit life insurance) and HRS § 431:10B-108(k) (2005) (adopting Chapter 91's adjudicatory process for approval and denial of, *inter alia,* the schedules of premium rates by the insurance commissioner); (3) HRS § 431:10C-214 (2005) (adopting the rule-making procedures for the disposition of insurance claims arising out of motor vehicle accidents) and HRS § 431:10C-212(c) (2005) (adopting the adjudicatory procedures for the denial of claim by insurer); and (4) HRS § 432E-12 (2005) (adopting the rule-making procedures for patients' bill of rights) and HRS § 432E-6(4) (2005) (adopting the adjudicatory process for review of manage care plans). Here, the Hawai'i RSA statutes do not contain language demonstrating the legislature's intent that Chapter 91's adjudicatory provisions be followed.

Moreover, even when a statute's reference to Chapter 91 is silent as to the adoption of its adjudicatory provisions, it appears that the agency has the discretion to decide whether to adopt the adjudicatory provisions of HRS chapter 91 when promulgating its administrative rules. For example, although the Hawaiian Homes Commission Act (HHCA) – specifically, HHCA § 222 (Supp. 2005) – expressly indicates that the department of Hawaiian home lands "shall adopt rules and regulations and policies in accordance with [C]hapter 91," it is silent as to the adoption of the adjudicatory provisions. Nevertheless, the department adopted the adjudicatory provisions of Chapter 91. *See* HAR § 10-5-32. Similarly, HRS chapter 448B, concerning the licensure of dietitians, provides that the director of health shall "[a]dopt, amend, or repeal rules pursuant to [C]hapter 91 as the director finds necessary to carry out this chapter." HRS § 448B-3(2)

(Supp. 2005). Yet, chapter 448B is silent as to the application of the adjudicatory provisions. Title 11, chapter 79 of the HAR, applicable to dietitians, however, clearly incorporated the adjudicatory provisions of Chapter 91 into its dispute resolution procedures. HAR § 11-79-13(f). Such is not the case here. HAR § 17-402-17 does not dictate that the grievance process is to be conducted in accordance with Chapter 91. In fact, HAR § 17-402-17 clearly establishes a procedure that is consistent with the purpose of the Hawai'i RSA and the federal RSA. As required by the federal RSA, HAR § 17-402-17 recognizes the federal adjudication path, a condition that the State must accept to become a designated SLA. Accordingly, we are unconvinced that the reference to the rule-making procedures of Chapter 91 in HRS § 102-14(b) mandates the adoption of the chapter's adjudicatory provisions.

We also note that HRS § 347-12.5 lends further support that jurisdiction lies with federal courts. Section 347-12.5, which establishes the RSR Account, provides that:

> (a) . . . The [RSR A]ccount shall be used by [DHS] for:
>
> > (1) The provision of the following benefits for blind vendors:
> >
> > > (A) *A retirement or pension plan*;
> > >
> > > (B) *Health insurance*; and
> > >
> > > (C) Sick and vacation leave;
> >
> > (2) *The maintenance and replacement of equipment used in the blind vending program*;

(3) *The purchase of new equipment to be used in the blind vending program*; and

(4) The provision of *management services*, which shall include, but not be limited to:

(A) The hiring of consultants;

(B) The sponsoring of training seminars;

(C) Transportation;

(D) Per diem for vendors to attend meetings of the state committee of blind vendors;

(E) Services for the state committee of blind vendors; and

(F) Other costs related to the blind vending program.

(b) Income from vending machines on *federal, state, and county properties* that are within reasonable proximity to, and in direct competition with, a blind vendor may be deposited into the account and then disbursed to the blind vendor.

(c) *The revolving account shall consist of funds derived from*:

(1) *Vending machine income generated by federal, state, and county operations*;

(2) Any other legally accepted source of income; and

(3) Donations.

(Emphases added.) Thus, Hawai'i's statute acknowledges its acceptance of the federal RSA program and sets out regulations, to the extent permitted by the federal RSA, that are applicable to federal, as well as state and county, properties. The RSR Account provides a strong implication that the state and county properties fall within "other property" because income generated from state and county vending facilities, as well as federal facilities, are deposited into one central account, from which funds may be used for the benefit of blind vendors in Hawai'i. In other words, the Hawai'i RSA unequivocally authorizes the use of funds in the RSR Account "derived in whole or in part, directly or indirectly, from the operation of vending facilities on any [f]ederal property," 34 C.F.R. § 395.1(n), to, *inter alia*, provide management services, maintain and replace equipment, and purchase new equipment for vending facilities on non-federal property.

Moreover, pursuant to the authority granted by the legislature to promulgate rules and regulations, DHS recognized the legislative intent that state and county properties are to be considered "other property" when it defined the phrase to mean "property which is not federally controlled property and on which vending stands are established or operated." HAR § 17-402-17(a). It also defined "vendor" as "a blind licensee who is operating a vending facility on federal or *other property.*" HAR § 17-402-17(a) (emphasis added). Thus, under the Hawai'i RSA's rules and regulations, "other property" clearly includes state and county properties.[22]

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[22] The dissent suggests that reliance upon "other property" is "without factual basis" because "there is absolutely no evidence in the record to conclude that the City received funds from federal property

(Continued on following page)

If we were to accept the dissent's flawed-theory that the federal RSA applies to federal property and the Hawai'i RSA applies to state and county properties, there would have been no need for DHS to define the phrase "other property." In fact, if the dissent's theory is correct, the above stated definitions are nonsensical. For example, if the Hawai'i RSA applies only to state and county properties, as the dissent maintains, then "other property" must necessarily be defined as "federally controlled property" – rather than "*not* federally controlled property." Likewise, a "vendor" must necessarily be defined as "a blind licensee who is operating a vending facility on [*state and county property*] or other property [(*i.e.*, federally controlled property)]." The fact that DHS, in crafting its administrative rules pertaining to blind vendors adhered to the federal "viewpoint," clearly demonstrates its recognition of the relationship between the federal and the

---

and used those funds to establish or operate vending facilities on City property. It is also undisputed that the State did not operate vending machines on [C]ity property." Dissenting Op. at 23-24 (emphases omitted). It is undisputed that the City violated the Hawai'i RSA by placing its own leased machines in its public buildings, rather than providing blind vendors those spaces for their vending establishment. Had the City complied with the Hawai'i RSA, blind vendors would be given priority to place their vending machines in the City's buildings. In turn, the funds held in the RSR Account, *i.e.*, "income [deriving] from vending machines on federal, state, and county properties," HRS § 347-2.5(b), would be used for "the maintenance and replacement of equipment" and the "purchase of new equipment," HRS § 347-2.5(a), thereby, rendering the vending machines on the City's properties as "other property." *See also* HAR § 17-402-17(m)(1) (DHS "shall furnish each vending stand with adequate suitable equipment and adequate initial stock of merchandise necessary for the establishment and operation of the facility."). Accordingly, the lack of "evidence in the record" bears no relevance to the determination as to whether the county property would constitute "other property." As discussed *supra*, the state and county properties clearly fall under "other propert[ies]" of the federal RSA.

Hawai'i RSAs, including its incorporation of the federal adjudication path.

Our conclusion that the federal adjudication path prescribed in HAR § 17-402-17(j) is applicable to vending operations in all state, county, and federal properties in Hawai'i is consistent with *federal* case law, where federal courts have reviewed decisions rendered by an ad hoc arbitration panel convened by the Secretary involving certain states' blind vendors' programs operating in state or county properties. For example:

a. *Smith v. Rhode Island State Servs. for the Blind & Visually Handicapped*, 581 F. Supp. 566 (D. R.I. 1984)

In *Smith*, the United States District Court for the District of Rhode Island (the U.S. district court) examined certain regulations promulgated by Rhode Island's Department of Social and Rehabilitative Services, Division of Services for the Blind and Visually Impaired (RISB), *i.e.*, Rhode Island's SLA. There, the blind-vendor-plaintiff appealed from the decision of an ad hoc arbitration panel, such panel having (a) denied the plaintiff's request that he be appointed to a particular concession stand, Stand # 54 at the Garrahy Judicial Complex in Providence, Rhode Island,[23] and (b) remanded for proper promulgation of clear and unambiguous regulations regarding the seniority system. 581 F. Supp. at 567.

[23] The Garrahy Judicial Complex houses both state and county entities, such as the family court, district court, workers' compensation court, traffic tribunal, county sheriff's office, and the public defenders.

The U.S. district court expressly noted that:

> *Under the neoteric federal regulations, an application for designation as a state licensing agency must contain a plan outlining the rules and regulations applicable to the state's blind vendor program*, including the rules relating to the transfer and promotion of licensees [at issued in this case]. 34 C.F.R. §§ 395.3, 395.5. In accordance with this requirement, the RISB conceived, incubated, nurtured and thereafter submitted an ichnographic masterpiece yclept "Baby Randolph" as an adjunct to RISB's application for redesignation as a[n SLA] during the winter of 1979-1980. The rule governing the method of selection, transfer and promotion of blind vendors is found in Attachment IX-A, Paragraph C.1 of that plan. That section provides in substance that the transfer and promotion of vendors shall be based upon seniority, and outlines the method by which seniority is to be calculated.

Id. at 568 (emphasis added). Thereafter, in approximately 1977, in response to newly enacted federal regulations, "RISB began developing a state plan of rules and regulations for the Rhode Island blind vendor program." *Id.* at 569. The state's rules and regulations were eventually promulgated and subsequently approved by the federal government. Pertinent to this case, Article IX, entitled "Selection, Transfer and Promotion of Vendors" provided:

> The SLA . . . with the active participation of the State Committee of Blind Vendors, hereby establishes a selection transfer and promotion system for vendors which will be uniformly applied to all vendor vacancies that develop or

> occur in the vending facilities program as outlined in Attachment IX-A.

Id. at 570.

> Attachment IX-A, Paragraph C.1 addressed the method of selection, transfer and promotion of vendors in the following verbiage:
>
> In accordance with the standards as outlined in Paragraphs A and B, the selection, transfer and promotion of vendors shall be based upon seniority. The SLA shall establish and maintain a roster containing the name of each vendor, the date of his or her original licensing, any subsequent date(s) of relicensing and their vending facility address. Seniority, then, shall be calculated from the original date of licensing which shall be multiplied by the number of months during which the vendor was assigned and licensed to operate any vending facility which has been established by this SLA.

Id.

Subsequently, RISB compiled an updated seniority roster, wherein the plaintiff was ranked junior to another licensed blind vendor who eventually was assigned to Stand # 54. RISB did not count employment at any agency stand towards seniority in the blind vendor program. The plaintiff appealed the decision of the RISB, arguing that his time in service at an agency stand should have been counted. *Id.* The hearing officer declined to disturb RISB's award of Stand # 54. *Id.* Thereafter, the plaintiff appealed that decision to an arbitration panel pursuant to 20 U.S.C. § 107d-2. Therein, the arbitrator determined that the seniority rules as promulgated by RISB were ambiguous and ordered RISB to adopt a clear and unambiguous

seniority scheme. *Id.* at 571. The arbitrator specified that Stand # 54 was to remain with the other licensed blind vendor pending a permanent award of Stand # 54.

On appeal to the U.S. district court, the plaintiff pressed his claims for monetary damages and for modification of the seniority list to reflect what he asserted was his proper rank. *Id.* at 572. The court denied and dismissed the plaintiff's claims, holding that the arbitrator's finding with respect to the ambiguity of the language contained in the state's seniority rule was supported by the evidence and was neither arbitrary nor capricious. *Id.* at 573-74.

b. *McNabb v. United States Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988)

The factual and procedural background in *McNabb* further indicates that disputes arising from the operation of the state's blind vending program on state property are reviewable by federal courts.

The facts are as follows:

> McNabb is a blind person licensed under the [RSA] to operate a vending facility in Arkansas. On September 12, 1980, McNabb bid for three telephone company vending facilities. In violation of applicable laws and regulations, two of these facilities, which were more profitable than the stand McNabb then operated, were awarded to blind vendors with less seniority than McNabb.
>
> On October 20, 1980, McNabb filed a grievance, requesting a full evidentiary hearing as provided for in 20 U.S.C. § 107d-1(a). On February 11,

> 1981, the hearing officer upheld the denial of the vending stands to McNabb.
>
> McNabb then filed a complaint with the [USDOE], also pursuant to 20 U.S.C. § 107d-1(a), requesting that an arbitration panel be convened to decide his entitlement to one of the facilities he had been denied. He later amended his complaint to request specific relief: assignment to one of the stands with damages for the period he was denied a stand, as well as attorney's fees and costs.

862 F.2d at 682. The USDOE arbitration panel took the position that neither compensatory relief nor attorney's fees were contemplated under the RSA and that such awards would be contrary to the principle of sovereign immunity. *Id.* at 683. Subsequently, another arbitration decision was issued, finding that McNabb had wrongfully been denied one of the stands. "As relief, the panel gave McNabb[, *inter alia,*] a continuing right of assignment to the first of the two stands at issue that became vacant." 862 F.2d at 683

Thereafter, McNabb requested that the USDOE arbitration panel reconvene to award him additional relief. The arbitration panel refused to reconvene, taking the same position that the RSA and the Eleventh Amendment to the United States Constitution precluded the panel from awarding compensatory relief or attorney's fees against state agencies. *Id.* McNabb appealed to the federal district court, wherein the court held that

> arbitration panels convened pursuant to the [RSA] have the authority to award compensatory relief and attorney's fees. Without specifically discussing the issue of whether the eleventh

> amendment barred such awards, the district court stated that it chose to follow the Third Circuit's decision in [*Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education,*] 772 F.2d 1123 (3d Cir. 1985). In *Delaware,* the Third Circuit, which is the only circuit that has considered this question, held that: (1) the [RSA] impliedly authorizes compensatory damage awards against state agencies; (2) states that choose to participate in this federally-created program for blind vendors thereby waive their eleventh amendment immunity; and (3) attorney's fees are an appropriate element of compensatory damages for breach of contract between a blind vendor and a state agency.

Id. Accordingly, the USDOE and the Arkansas Department of Human Services appealed the federal district court's decision to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit essentially affirmed the judgment, holding that the arbitration panel, convened pursuant to the RSA, did not have authority to award retroactive money damages against the state for wrongful denial of stands to blind vendors, but was authorized to award prospective damages from the date of the arbitration panel's decision to the date vendor accepted assignment to a new vending facility. *Id.* at 683-88. For subsequent history, *see McNabb v. Riley,* 29 F.3d 1303 (8th Cir. 1994).

c. *Delaware Dep't of Health & Soc. Servs., Div. for the Visually Impaired v. United States Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985)

As mentioned *supra, Delaware* involves an action by the state agency designated to administer the blind vendor program in Delaware, challenging a USDOE arbitration panel's award of retroactive monetary damages and attorney's fees to a blind vendor who was found to have been improperly denied a vending facility by the SLA.

The facts in *Delaware* indicate the following:

> Albanese is . . . a blind vendor licensed by the Delaware Division of the Visually Impaired for participation in the Randolph-Sheppard program. . . . A federal regulation requires that [SLAs] establish in writing and maintain policies which govern transfer, promotion, and financial participation of vendors. 34 C.F.R. § 395.7(c) (1984). Delaware's rules set forth a comprehensive scheme for the distribution of funds generated to each blind vendor facility. Of particular significance to this case, is the state regulation which deals with transfer and promotion of blind vendors. . . .
>
> . . . .
>
> In August of 1979, the Delaware Division of Visually Impaired solicited applications for management of its food vending facility at the Paramount Poultry Company, in Georgetown, Delaware. Two applicants responded. Albanese claimed to be the most senior qualified applicant, but the Division of Visually Impaired in October, 1979 appointed the less senior applicant. Albanese, pursuant to the Delaware regulations,

> mandated by 20 U.S.C. § 107(b)(6) and 34 C.F.R. § 395.13(a) (1984), filed a grievance, which resulted in a full evidentiary hearing before a state hearing examiner on February 24, 1981.
>
> The hearing examiner found that Albanese was the most senior qualified applicant, and ordered the Delaware Division of Visually Impaired to install him as manager of the Georgetown facility. Albanese commenced work there on April 1, 1981. The hearing examiner also ordered the state agency to pay a portion of Albanese's legal expenses. . . . The hearing examiner declined, however, to award Albanese the increased income he would have earned between the time he should have been appointed and April 1, 1998, when he commenced work.

772 F.2d at 1132 (citations omitted). Accordingly, Albanese filed a complaint with the USDOE, alleging his dissatisfaction with the failure of the state hearing examiner to award back pay and full legal attorney's fees. *Id.* An arbitration panel was convened and awarded Albanese monetary damages in the form of back pay and full attorney's fees. *Id.* at 1134. On appeal to the federal district court, the court vacated the arbitration decision and granted the state agency summary judgment. *Id.* at 1136. On appeal to the United States Court of Appeals for the Third Circuit by Albanese, the Third Circuit Court essentially reversed the federal district court's decision.

d. *Fillinger v. The Cleveland Soc'y for the Blind*, 587 F.2d 336 (6th Cir. 1978)

In *Fillinger,* the blind-vendor-plaintiffs operated vending stands in Cleveland, Ohio, under the management of the Cleveland Society for the Blind (the

defendant). The plaintiffs filed suit against the defendant, its executive director, and the Ohio Rehabilitation Services Commission, "which supervise[d] in Ohio a vending stand program established pursuant to federal law[.]" 587 F.2d at 337. The plaintiffs alleged numerous abuses in the operation of the program.

> The gist of their suit is that for many years the [defendant], acting without the consent of the blind vendors, has collected a higher percentage of gross sales than is "reasonable" under the [RSA] and has spent these funds for unauthorized purposes.

Id. The federal district court dismissed the complaint, and the plaintiffs appealed. *Id.* The United States Court of Appeals for the Sixth Circuit reversed and remanded the case. The Sixth Circuit granted the plaintiffs "an opportunity to exhaust their administrative and arbitration remedies. After such remedies are exhausted, any party aggrieved by the arbitrator's decision may petition the district court . . . for review." *Id.* at 338.[24]

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[24] As discussed *supra*, the foregoing cases involved disputes arising from the operation of vending machines on state properties or the administration of the state RSA program, which was established pursuant to the federal RSA. However, the dissent attempts to distinguish the above cases from the facts of this case by contending that these cases "involved *federal* claims brought under the federal RSA where the federal adjudication path was applicable." (Emphasis in original.) Dissenting Op. at 52. The dissent takes such position because of its reliance upon its flawed bright-line treatment of the federal and Hawai'i RSAs. As previously discussed, the federal and Hawai'i RSAs are closely intertwined in that the participation of the federal RSA requires the creation of the Hawai'i RSA and acceptance of certain conditions set forth in the federal RSA, such as the federal adjudication path.

Therefore, based on our examination of the overall scheme of the federal RSA and its relationship to the Hawai'i RSA, as well as federal case law, we hold that, inasmuch as the federal adjudication path applies to disputes arising from the Hawai'i RSA, the circuit court lacks subject matter jurisdiction to decide the merits of the instant case.

3. *Hawai'i Blind Vendor Ass'n v. Dep't of Human Servs.*, 71 Haw. 367, 791 P.2d 1261 (1990)

Lastly, the plaintiffs maintain that this court has jurisdiction to decide issues relating to the establishment of vending operations in state and county buildings for blind vendors under the Hawai'i RSA inasmuch as this state's only blind vendor case, *Hawai'i Blind Vendors Association v. Department of Human Services,* 71 Haw. 367, 791 P.2d 1261 (1990), has so determined. In that case, Maka'ala, a Hawai'i non-profit corporation that provides employment preferences to handicapped individuals, leased space at the airport for a retail concession. *Id.* at 370, 791 P.2d at 1263-64. Thereafter, DHS renewed the Maka'ala airport lease, without first providing notice of vacancy or opportunity for blind vendors to apply for the concession. *Id.* at 370, 791 P.2d at 1264. Consequently, the Hawai'i Blind Vendors Association (the plaintiff) brought action against DHS, alleging violations of the substantive and procedural law governing the blind vendor program. *Id.* at 368, 791 P.2d at 1263. The circuit court granted summary judgment in favor of DHS, and the plaintiff appealed. *Id.*

On appeal, DHS argued that the issue must first be brought through an administrative hearing before bringing

an original action in the circuit court. *Id.* at 370-71, 791 P.2d at 1264. This court, however, held that it "need not decide this issue" inasmuch as,

> [u]nder the doctrine of primary jurisdiction, when a court and an agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency, the judicial process is suspended pending referral of such issues to the administrativebody for its views. Thus, the DHS agency process, if available, is the appropriate forum for an initial determination of the issues raised in this case.

Id. at 371, 791 P.2d at 1264 (citation omitted). Consequently, this court "remand[ed the blind vendors' claims] to DHS for an agency full and fair hearing." *Id.* at 374, 791 P.2d at 1266. Notably missing from this court's discussion is an examination of the interplay between the federal and the Hawai'i RSAs, which is understandable given the fact that the issue of subject matter jurisdiction was never raised. As a result, this court was not given the opportunity to examine the overall federal scheme and its relationship to the Hawai'i RSA as we have been compelled to do in the instant case. Thus, based on the foregoing examination and discussion, we overrule *Hawai'i Blind Vendors* to the extent that it can be interpreted to mean that this court has subject matter jurisdiction over issues arising from the Hawai'i RSA.

B. The State Defendants' Appeal/Cross-Appeal and the Plaintiffs' Appeal/Cross-Appeal

In light of our holding today, we need not address any of the remaining contentions raised by the State

defendants and the plaintiffs' in their respective appeals and cross-appeals.

IV. CONCLUSION

Based on the foregoing, we reverse the circuit court's August 22, 2001 final judgment for lack of subject matter jurisdiction.

On the briefs:

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DISSENTING OPINION BY POLLACK, J.,
WITH WHOM ACOBA, J., JOINS

Today, the majority holds that a federal law has the effect of divesting Hawai'i courts of jurisdiction over a state claim brought under a Hawai'i statute. In my view, and with all due respect, the majority's holding: (1) violates the Eleventh Amendment to the United States Constitution; (2) is contrary to explicit language in the Randolph-Sheppard Act (federal RSA) and its legislative history; (3) misapprehends the "federal adjudication path" set forth in the federal RSA; (4) misinterprets the phrase "adopt rules in accordance with [Hawai'i Revised Statutes c]hapter 91" to mean that an agency can adopt rules

that conflict with HRS chapter 91; (5) applies an administrative rule to divest state courts of jurisdiction in contravention of provisions of state law vesting such jurisdiction in state courts; (6) erroneously overrules *Hawaii Blind Vendors Ass'n v. Dep't of Human Servs.*, 71 Haw. 367, 791 P.2d 1261 (1990), which had previously determined subject matter jurisdiction existed in a similar case; and (7) reaches a result that is fundamentally at odds with the uniform weight of federal and state case authority. As such, the majority holding has broad adverse consequences beyond this case.

I. INTRODUCTION

The federal RSA provides employment opportunities for the blind by granting "priority to those blind persons who desire to operate vending facilities on *federal* property." *Tenn. Dep't of Human Servs. v. U.S. Dep't of Educ.*, 979 F.2d 1162, 1163 (6th Cir. 1992) (emphasis added) (citation omitted). Responsibility for implementing and overseeing the blind vendor program is divided between state and federal agencies.

Participating states may gain access to federal property by applying to the United States Department of Education (USDOE) to participate in and administer the program. "State agencies [of participating states] must agree to set up licensing programs for blind vendors [and] match them with available contracts for vending facilities on *federal property*." *New Hampshire v. Ramsey*, 366 F.3d 1, 5 (1st Cir. 2004) (emphasis added). Once the state agency is approved, it is known as a "state licensing agency" (SLA). Any participating state also agrees to a three-step grievance process for dealing with blind

licensees who are dissatisfied with the operation of the federal vending program (federal adjudication path).

In 1937, Hawai'i established its own counterpart statute to the federal RSA to provide blind persons with vending opportunities on state and county property (Hawai'i RSA). Plaintiffs claim that the City and County of Honolulu (City) failed to provide vending opportunities to blind persons on *city property* and that the State of Hawai'i (State) failed to enforce the requirements of the Hawai'i RSA.

The majority concludes that the federal RSA divests Hawai'i courts of jurisdiction over a claim brought under the Hawai'i RSA. The majority's interpretation transforms the federal RSA into a monolithic statute inclusive of virtually all state and county property in the United States, far beyond its present scope and directly contrary to Congressional intent. The decision also critically undermines important concepts of federalism and creates a new standard whereby the State may be haled into federal court based on an attenuated form of statutory waiver of sovereign immunity.

II. UNDER THE ELEVENTH AMENDMENT, FEDERAL COURTS DO NOT HAVE JURISDICTION OVER PLAINTIFFS' CLAIMS BECAUSE THE STATE DID NOT WAIVE ITS SOVEREIGN IMMUNITY TO ALLOW STATE CLAIMS TO BE BROUGHT IN FEDERAL COURT

The majority holds that federal courts have exclusive jurisdiction over the Plaintiffs' claims, which are based upon alleged violations of Hawai'i state law. Actually, the opposite is true. Under well-settled authority interpreting

the Eleventh Amendment to the U.S. Constitution (Eleventh Amendment), federal courts have no jurisdiction over a claim in which a citizen files suit against a state or its agencies based on violations of that state's laws. "[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 121 (1984).

A federal court has the power to adjudicate such a claim only when the state has *expressly* waived its sovereign immunity to the claim being brought in federal court. The majority's assertion that the federal courts are the proper forum for this case directly contradicts the principles of sovereign immunity and federalism exemplified by the Eleventh Amendment. The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

By its express terms, the Eleventh Amendment refers only to suits against a state by out-of-state citizens. The United States Supreme Court has repeatedly held, however, that despite the limited terms of the amendment, states are also immune from suits brought in federal court by their own citizens. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 55 (1996); *Pennhurst,* 465 U.S. at 98-99; *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974); *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 51 (1944); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890).

The Court has determined that "federal jurisdiction over suits against unconsenting states 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Pennhurst,* 465 U.S. at 98 (quoting *Hans,* 134 U.S. at 15). The Court has further established that:

> *[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State . . . and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Id. at 98-99 (quoting *Ex parte State of New York,* 256 U.S. 490, 497 (1921)) (emphasis in original). A state's immunity from suit in federal courts is not absolute. Federal courts, however, must consider the Eleventh Amendment whenever a state appears as a defendant before them:

> The Eleventh Amendment may be described as either creating an immunity for states or establishing a jurisdictional limitation on federal courts. . . . [T]he effect of the Eleventh Amendment must be considered *sua sponte* by federal courts.

Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, 810 F.2d 869, 873 n.2 (9th Cir. 1987). The Court has recognized only two circumstances under which an individual may sue a state in federal court. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999). "First, Congress may authorize such a suit in the exercise of its power to enforce the

Fourteenth Amendment." *Id.* "Second, a State may waive its sovereign immunity by consenting to suit." *Id.*

"A State may waive its constitutional immunity through a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985). In each of these situations, the Court "requires an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Id.; see also Tenn. Dep't of Human Servs.,* 979 F.2d at 1166.

Thus, a court will find that a state has waived its sovereign immunity through a statute or constitutional provision "'only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'" *Atascadero,* 473 U.S. at 239 (quoting *Edelman v. Jordan,* 415 U.S. 651, 673 (1974)) (brackets omitted). In *Kalima v. State,* 111 Hawai'i 84, 101, 137 P.3d 990, 1007 (2006), this court echoed the U.S. Supreme Court's language where it held that "a statutory waiver of sovereign immunity must be clear and unequivocal and must be strictly construed."

A close inspection of the federal RSA and the Hawai'i RSA reveals nothing in either statute that would be sufficient to strip the State of its Eleventh Amendment immunity for claims made pursuant to the state statute. Based on the applicable statutes and case law, the federal courts have no jurisdiction to adjudicate claims based on the State's alleged violations of the Hawai'i RSA.

A. The Federal RSA Does Not Compel Waiver of Eleventh Amendment Immunity Over State Law Claims

Both the Third Circuit and the Ninth Circuit have held that participation in the federal RSA is conditioned on a waiver of a participating state's sovereign immunity to enforcement of arbitration awards based on violations of the federal RSA in federal court. *Premo v. Martin,* 119 F.3d 764, 769 (9th Cir. 1997); *Del. Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ.,* 772 F.2d 1123, 1137-38 (3d Cir. 1985).

Waiver of sovereign immunity as a condition of participation in a federal program created by federal law *does not,* however, affect a state's sovereign immunity against being subjected to a lawsuit in federal court for a claim that arises from an alleged violation of a *state* statute. This is true even where, as in this case, the state statute is modeled after the federal statute.

The majority relies on the Ninth Circuit's analysis in *Premo,* 119 F.3d at 770, to conclude that the State has "*implicitly* surrendered its sovereign immunity to suits in federal courts" for violations of the Hawai'i RSA. Majority op. at 36 (emphasis added). The majority's interpretation of *Premo* inordinately expands the holding in that case, inasmuch as *Premo* did not address blind vendor programs on state or county property and was entirely based on violations of the federal RSA.

The majority acknowledges that the property involved in *Premo* was controlled by the federal government and that the issue in the case was the enforcement of arbitration awards for violations of the federal RSA. Majority op. at 35. The instant case involves neither the

federal RSA nor the sections of Hawai'i law adopted by the legislature to enable the State to participate in the federal RSA. Rather, this case involves a state law that is separate and distinct from the federal law on which it is based. Thus, under the circumstances of this case, a waiver of Eleventh Amendment immunity cannot be implicit; it must be express and unequivocal. The majority, in relying on *Premo,* muddles the key distinction between that case and the one before this court and expands the reach of the federal courts far beyond the limits contemplated by the Ninth Circuit.

To reiterate, there is simply nothing in the federal RSA that can be read as an "unmistakably clear" statement by Congress that states which adopt their own legislation creating similar blind vendor programs for state property must waive their sovereign immunity to suit in federal court. One wonders, in fact, if Congress would have the power to condition state legislation on a waiver of claims under state law. Ultimately, this question remains rhetorical, because the federal RSA makes absolutely no mention of the existence or creation of statutes such as the Hawai'i RSA. Indeed, were the federal law repealed, the Hawai'i RSA would remain in place, as would the State's immunity to being sued in federal court on a claim arising from the Hawai'i RSA.

B. The Hawai'i RSA Does Not Waive Eleventh Amendment Immunity Over Claims Arising Under the Hawai'i RSA.

There is also nothing in the text of the Hawai'i RSA or its administrative rules that can reasonably be read as providing consent for the State to be sued in federal court for a violation of the state statute. Neither HRS § 102-14

(Supp. 2005) nor HRS § 347-12.5 (1993) mentions sovereign immunity or judicial review, as a comparison between the federal and state RSA demonstrates.

Section 107-d(1)(a) of the federal RSA provides a dissatisfied licensee with a full evidentiary hearing before the state licensing agency and an opportunity to appeal the agency's decision to the USDOE for review by an arbitration panel:

> If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute.

Pub. L. No. 93-651, § 206, 89 Stat. at 2-11, codified at 20 U.S.C. § 107d-1(a). The USDOE's arbitration decisions are made subject to judicial review in § 6(a) of the 1974 Amendment:

> [T]he Secretary shall convene an ad hoc arbitration panel . . . [,] give notice, conduct a hearing, and render its decision which *shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5* [5 USCS §§ 701 et seq.].

Id., codified at 20 U.S.C.S. § 107d-2(a) (emphasis added). Section 6(a)'s reference to chapter 7 of Title 5 is to the administrative procedures and judicial review provisions of the federal Administrative Procedures Act (APA). These provisions of the federal RSA establish the remedial scheme of the federal law.

In direct contrast, there is no reference whatsoever to the federal adjudication path in the statutory provisions of the Hawai'i RSA. In fact, neither HRS § 102-14 nor HRS

§ 347-12.5 mentions dispute resolution procedures. Nothing in the state statute demonstrates the clear intention of the legislature to waive the State's Eleventh Amendment immunity. Rather, the Hawai'i RSA merely provides that "[t]he department of human services . . . shall adopt rules in accordance with chapter 91, necessary for the implementation of this section[.]" HRS § 102-14(b).

The majority's particular reliance on the fund-mixing provision of HRS § 347-12.5 as evidence that the State has agreed to waive its Eleventh Amendment immunity for disputes arising from the Hawai'i RSA is plainly in error. There is nothing in the text of HRS § 347-12.5 that can be read as providing a "clear and unequivocal" waiver of the State's Eleventh Amendment immunity. There is also nothing in the legislative history of HRS § 347-12.5 that indicates any intention on the part of the legislature to waive such immunity.[1]

C. The Hawai'i Administrative Rules Do Not, and Could Not, Waive the State's Eleventh Amendment Immunity

The majority's reliance on HAR § 17-402-17(j), the vendor's complaint provision, is also misplaced. The provision states, in relevant part, as follows:

> (j) Evidentiary hearings and arbitration of vendor complaints shall be provided for in the following manner:

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[1] *See,* Sen. Stand. Comm. Rep. No. 205, in 1991 Senate Journal, at 866; Sen. Stand. Comm. Rep. No. 726, in 1991 Senate Journal, at 1023; Sen. Stand. Comm. Rep. No. 927, in 1991 Senate Journal, at 1170; Sen. Stand. Comm. Rep. No. 1189, in 1991 Senate Journal, at 1267-68.

> (9) The vendor shall be informed of the right to request the [Secretary] to convene an ad hoc arbitration panel, if the vendor is dissatisfied with any action taken or decision rendered as a result of the full evidentiary hearing.

The rules adopted by Defendant-Appellant/Cross-Appellee Department of Human Services, State of Hawai'i (DHS) under the authority of HRS § 102-14(b) reference some aspects of the federal adjudication path. They do not adopt that path in its entirety. The key provisions of the federal RSA that provide for binding arbitration and judicial review are conspicuously absent from the HAR. In fact, HAR § 17-402-17(j), which the majority asserts "reflects the federal adjudication path," *makes no mention of sovereign immunity or judicial review*. The HAR provision also does not provide a right to appeal the arbitration decision in pointed contrast to the federal RSA.

In HAR § 17-402-17(j), the DHS expressly adopted some provisions of the federal adjudication path while omitting other provisions. The majority interprets the DHS's adoption of some aspects of the federal adjudication path as demonstrating the agency's intention to bind the State solely and exclusively to that path. Majority op. at 44-45. This interpretation, however, does not explain the DHS's omission of relevant portions of the federal adjudication path from the express language of HAR § 17-402-17(j).

The DHS's failure to include these portions of the federal adjudication path must be viewed as an intentional decision to delete those portions from the language of HAR § 17-402-17(j). Because "courts will not presume an oversight on the part of the legislature where such presumption is avoidable," this omission must be seen as

intentional. *See Reefshare, Ltd. v. Nagata,* 70 Haw. 93, 98, 762 P.2d 169, 173 (1988); *see also, Levy v. Kimball,* 51 Haw. 540, 544, 465 P.2d 580, 583 (1970) (legislature's omission of portion of federal statute must be seen as intentional rather than as an oversight).

This intentional omission, moreover, must be reasonably interpreted as intending to limit, not adopt, the federal adjudication path in the context of the Hawai'i law. Under firmly entrenched principles of statutory construction, the omission must be construed as purposefully differentiating between the federal adjudication path and that to be applied to the Hawai'i RSA.

> It is a generally accepted rule of statutory construction that where the legislative body adopts a law of another State all changes in words and phraseology *will be presumed to have been made deliberately and with a purpose to limit*, qualify or enlarge the adopted law to the extent that the changes in words and phrases imply. Moreover where portions of the statute adopted are omitted the difference in phraseology . . . may have special interpretative significance. Where . . . the legislative body adopts isolated portions of the statute of another State to the exclusion of other provisions upon the same subject matter, included in the same section from which the language adopted was taken, *the statute as ultimately enacted must be given effect accordingly as such exclusions were intended to limit*, qualify or enlarge the portions adopted.

Id. at 544-45, 465 P.2d at 583 (emphasis added).

The clear implication of the DHS's intentional omission of relevant portions of the federal adjudication

path from the Hawai'i law is *not* that the agency intended to adopt that adjudication path completely and exclusively for disputes arising from the Hawai'i statute, as the majority suggests. Rather, the logical and reasonable implication is that the DHS intended to limit the reach of the federal adjudication path in the context of the Hawai'i RSA. HAR § 17-402-17(j)'s omitted reference to the federal RSA's binding arbitration and judicial review provisions must be viewed as intending to remove these provisions from the Hawai'i RSA and demonstrates the State's lack of consent to be sued in federal court for violations of the state law.

Furthermore, nothing in HAR § 17-402-17(j) provides consent "by the most express language" for a waiver of the State's sovereign immunity to suit in federal court for a violation of the state law. *See Atascadero,* 473 U.S. at 239. It cannot reasonably be said that the text of the Hawai'i RSA and its attendant regulations leaves "no room for any other reasonable construction" than that the State has waived its sovereign immunity. *See id.*

In sum, applying established canons of construction, HAR § 17-402-17(j) allows aggrieved vendors the discretion to seek arbitration before the Secretary at their own behest without abrogating the State's sovereign immunity from suit in federal court. The majority's conception of the rule is not consistent with such canons. The majority ordains consent by the State to be sued in federal court for violations of the Hawai'i RSA, despite the fact that the word(s) "appeal," "federal court" or "waiver of immunity" do not appear in the

language of HAR § 17-402-17(j).[2] This interpretation misapprehends both what is present in and what is absent from the agency rules.

In any event, HAR § 17-402-17(j) could not waive sovereign immunity. Only the state legislature has the authority to waive a state's Eleventh Amendment immunity. *See Atascadero,* 473 U.S. at 234 (holding that state may waive sovereign immunity "by a state statute or constitutional provision" if the provision explicitly specifies state's intention to subject itself to suit in federal court). The only exception is where the legislature *expressly delegates* this authority to an administrative agency. *See The Ninth Ave. Remedial Group v. Allis-Chalmers Corp.,* 962 F. Supp. 131, 134 (D. Ind. 1997) (legislature may expressly delegate the authority to waive immunity).

Nothing, however, in the Hawai'i RSA can be read as expressly delegating to the DHS the authority to waive the State's immunity. The DHS is given only the power to "adopt rules in accordance with chapter 91," and there is nothing in chapter 91 allowing a state agency to waive sovereign immunity on behalf of the State. On the contrary, chapter 91 expressly provides that judicial review of contested cases shall take place in the state courts.[3] *See* HRS §§ 91-14(a) and (b) (1993).

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[2] If § 17-402-17(j) could reasonably be read as requiring appellate review in federal courts, such a requirement would be contrary to state law and well established principles of agency law. *See infra* Part IV.

[3] *See infra* Part V(B) for further discussion of the legislature's mandate that rules be adopted in accordance with chapter 91.

D. The Hawai'i Legislature Has Explicitly Waived the State's Sovereign Immunity to Suit in State Court for a Violation of the Hawai'i RSA

For the foregoing reasons, the legislature has not waived the State's sovereign immunity to a state law claim under the Hawai'i RSA being filed in federal court. Therefore, contrary to the majority's holding, there is no legal doctrine that would have allowed the Plaintiffs' claim to have been originally brought in federal court.

On the other hand, Hawaii's legislature has explicitly waived the State's sovereign immunity to suit in state court for a violation of the Hawai'i RSA. HRS § 661-1 (1993) provides as follows:

> The several circuit courts of the State . . . shall . . . have original jurisdiction to hear and determine the following matters . . .
>
> (1) All claims against the State founded upon any statute of the State[.]

Section 661-1 clearly and expressly waives the State's sovereign immunity and allows the State to be sued for violations of its statutes. The statute also expressly vests jurisdiction for those claims in the circuit courts of the state.

The State's consent to being sued under HRS § 661-1, however, "does not extend consent to suits in federal courts." *Office of Hawaiian Affairs v. Dep't of Educ.*, 951 F. Supp. 1484, 1491 (D. Haw. 1996); *see also Price v. Hawaii*, 921 F.2d 950, 958 (9th Cir. 1990) ("[T]hat the State has consented to being sued in its own courts . . . does not waive its Eleventh Amendment immunity."). In fact,

Hawaii's legislature has made it clear that HRS § 661-1 does not extend jurisdiction to the federal courts:

> [T]he intent of the legislature in amending section 661-1 and 662-3, Hawaii Revised Statutes, in 1978 to extend jurisdiction to district courts in tort actions on claims against the State and certain other claims against the State, was originally and is now to extend jurisdiction for such actions and claims against the State to state district courts, and *not to extend jurisdiction for such actions and claims to federal district courts*.

1984 Haw. Sess. L. Act 135, § 1 at 258 (emphasis added).

That the State may waive its sovereign immunity in its own courts while still retaining its Eleventh Amendment immunity reflects the important principle that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst,* 465 U.S. at 99 (emphases in original).

This principle is of paramount importance to the instant case because while the State has given consent to being sued in state court for violations of its statutes, it has never consented to being sued in federal court for violations of the Hawai'i RSA. Therefore, according to the principles of sovereign immunity inherent in the Eleventh Amendment, the courts of the State of Hawai'i enjoy sole and exclusive jurisdiction to decide this case. The federal courts have no jurisdiction to adjudicate Plaintiffs' claims.

III. THE FEDERAL RSA EXPRESSLY LIMITS ITS SCOPE TO FEDERAL PROPERTY OR TO "OTHER PROPERTY" AS SPECIFICALLY DEFINED BY THE CODE OF FEDERAL REGULATIONS

A. The Federal RSA, on its Face, is Clearly Limited to Federal Property and "Other Property"

Only federal law can provide the underlying basis for jurisdiction in a federal court. The federal RSA explicitly limits its application to "vending facilities on any *Federal* property." 20 U.S.C.A. § 107(a)[4] (emphasis added). "Federal property," in turn, is defined by 20 U.S.C.A. § 107(e).[5] The Code of Federal Regulation (C.F.R.) in 34 C.F.R. § 395.1[6] provides a similar limiting definition of

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[4] 20 U.S.C.A. § 107(a) provides as follows:

> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

[5] 20 U.S.C.A. § 107(e)(3) provides as follows:

> "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States.

[6] 34 C.F.R. § 395.1(g) provides as follows:

> "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the

(Continued on following page)

"Federal property." The limitation to federal property is reflected throughout the federal RSA. Section 107(b)(2), for example, provides: "Whenever feasible, one or more vending facilities are [to be] established on all Federal property." Indeed, the *chapter title of all thirteen sections* of the federal RSA is "Vending Facilities for Blind in *Federal* Buildings." (Emphasis added.) The definitions contained in the federal RSA do not in any way encompass, as the majority would have it, state and county property.

The majority acknowledges that, on its face, the federal RSA applies only to federal property, but nevertheless concludes that the federal adjudication path must be followed even for disputes involving "non-federal property":

> We fully recognize that the federal RSA ... involves the operation of a "vending facility on *any federal property.*" Thus on its face, it appears that DHS is obligated to comply with the federal adjudication path only with respect to claims relating to its management of vending machines on *federal* property. However, in our view it is the *overall scheme of the federal RSA* that dictates adherence to the federal adjudication path even in those situations involving non-federal property.

Majority op. at 28 (emphases in original).

United States, or by any department or agency of the District of Columbia or any territory or possession of the United States.

The majority patently violates a "cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, [this court] is not at liberty to look beyond that language for a different meaning." *State v. Haugen,* 104 Hawai'i 71, 76, 85 P.3d 178, 183 (2004); *see Allstate Ins. Co. v. Schmidt,* 104 Hawai'i 261, 265, 88 P.3d 196, 200 (2004) ("Where the language of a statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning."); *Akiba v. Waiolena,* 94 Hawai'i 262, 265, 12 P.3d 362, 365 (App. 2000) ("[I]f the statute is clear on its face, we need not resort to other principles of statutory construction in interpreting it."). Here, the federal RSA clearly, unambiguously, and explicitly restricts its application to federal property and "other property" as defined in the C.F.R. Thus, this court need go no further in determining its scope.

B. The Legislative History of the Federal RSA Reveals no Intent to Expand the Act to Include Non-Federal Property

In light of the plain and unambiguous language of the federal RSA, it would be fanciful to conclude that Congress surreptitiously induced the participation of a consenting state with the intended effect of divesting state courts of jurisdiction over state claims involving state property. Plainly, Congress would not override state laws and traditional principles of federalism by extending the reach of the federal RSA to non-federal property without expressly referencing such intent in the text of the federal statute itself or in its legislative history.

In fact, the legislative history of the federal RSA demonstrates that Congress had no such intent. The 93rd

Congress generated over sixty pages of committee reports regarding the 1974 amendments of the federal RSA. *See* S. Rep. No. 93-937, 93rd Cong., 2d Sess. (1974); S. Rep. No. 93-1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373. These two committee reports reference "federal property" and "federal buildings" scores of times.[7] Not a single time, however, do these reports ever state that the adjudication proceedings of the federal act would apply to "non-federal property."

It is also inconceivable that Congress would create such a fundamental change in the law without referencing that change in its ample committee reports. In fact, one committee report explains in detail a comparatively minor 1954 change in the federal RSA that slightly expanded its scope from "federal buildings" to "federal property" so as to include, for example, Army posts. *See* S. Rep. No. 93-937, at 5-7. Given its extensive analysis of this slight expansion of the law's scope, Congress would not have failed to so much as mention a change that would exponentially expand the reach of the RSA to include virtually all state and county property.[8]

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[7] *See, e.g.*, S. Rep. No. 93-937, at 3 ("The bill requires that a priority be given to the establishment of blind operated vending facilities *on Federal property*[.]"); *id.* at 10 ("[T]he Randolph-Sheppard program was created to be a *federal program.*"); *id.* at 12 ("The Randolph-Sheppard Act authorizes blind persons licensed by State agencies to operate vending stands *on Federal property*"); *id.* at 14 ("State agencies are urged to cooperate fully with the secretary in implementing the law and regulations and to actively seek out vending opportunities for blind licensees *on all Federal property.*"). (All emphases added.)

[8] According to the State's reply brief, at least forty-eight states, the District of Columbia, Puerto Rico, and the Virgin Islands have established licensing agencies under the federal RSA.

In 1972, Congress asked the General Accounting Office (GAO) to determine if blind vendors were receiving a preference as the 1954 Amendments required. The GAO's subsequent report "concluded that the program was languishing at the federal level while flourishing at the state level and in the private sector." *Texas State Comm. for the Blind v. United States,* 6 Cl. Ct. 730, 733 (1984). The GAO report "was a major catalyst for enacting the 1974 Amendments." *Id.* at 732.

It is illogical to conclude that in enacting the 1974 amendments Congress intended to interfere with highly successful state programs by bringing them under the control of a poorly performing federal program. On the contrary, and consistent with the GAO report, Congress sought to improve the effectiveness of the federal RSA by making revisions to the law to improve the performance of the federal program. Congress obviously did not intend to expand the federal RSA to include state property.

The 1974 amendments included the finding that, "the potential exists for doubling the number of blind operators on Federal and other property under the Randolph-Sheppard program within the next five years[.]" Pub. L. No. 93-651, § 201, 89 Stat. at 2-7; *see also* S. Rep. No. 93-937, at 13 (amendments can allow for "doubling within five years" of their enactment.) In 1974 there were a total of 3,307 blind vending stands throughout the United States. S. Rep. No. 93-937, at 10. Only 874 of those stands were located on federal property. *Id.* Thus, had Congress intended to bring non-federal properties within the ambit of the federal RSA program, it would have instantaneously nearly quadrupled the size of the federal program. There would have been no need to wait five years to "potential[ly]" double the size of the program.

Congress "urged [SLAs] to cooperate fully with the Secretary in implementing the law and regulations and to actively seek out vending opportunities of blind licensees *on all Federal property.*" *Id.* at 14 (emphasis added). Officials controlling federal property were expressly admonished to "work cooperatively with [federal officials and SLAs] to foster the expansion of the Randolph-Sheppard program to its fullest potential as rapidly as possible." *Id.* Congress also explicitly sought to ensure the "uniform treatment of blind vendor's [sic] by all *Federal* agencies" in order to assure the program's vitality and expansion. *Id.* at 27. Neither SLAs nor any federal officials were asked or told to take any action with regard to vending facilities or opportunities on state or county properties.

The legislative history of the 1974 amendments clearly demonstrates that Congress was unmistakably addressing the resolution of vendor disputes arising from federal, not state, property. This legislative history is in perfect accord with the express language of the federal RSA.

C. No Federal or State Case Has Ever Held That the Federal RSA Applied to State and County Property

Until today, no federal or state court has ever held that a state's participation in the federal RSA divests the courts of that state of jurisdiction over state claims involving state property under a state RSA. Nor has any court ever held that the federal RSA confers jurisdiction upon federal courts for state statutory claims arising from state property. Prior precedent has uniformly described the operation of the federal RSA in precisely the opposite

fashion. *See, e.g., Minnesota Dep't of Jobs & Training v. Riley,* 18 F.3d 606, 608 (8th Cir. 1994) (the [federal RSA] provides the framework for . . . giving blind persons licensed by state agencies priority to operate vending facilities on all *federal property* (citing 20 U.S.C. § 107(a)-(b)) (emphasis added)).

No state decision has ever held that the federal RSA encompasses all state and county property. To the contrary, numerous state courts have exercised subject matter jurisdiction in cases involving blind vendors operating on state or county property. *See infra* Part VII. Furthermore, no other state court has ever dismissed a case for lack of subject matter jurisdiction over a state RSA claim involving state or county property. With all due respect, no state has held as the majority does, because as indicated above, the majority's construction of the federal RSA has no foundation in the statute's language or legislative history but rests on an erroneous view of both.

D. The Majority's "Overall Scheme" Analysis is Faulty Under Principles of Statutory Construction

The majority "fully recognize[s] that the federal RSA . . . involves the operation of a 'vending facility on any federal property.'" Majority op. at 28. However, in the very same paragraph that this recognition is acknowledged, the majority draws an inconsistent conclusion that "it is the *overall scheme of the federal RSA* that dictates adherence to the federal adjudication path *even in those situations involving non-federal property.*" *Id.* (emphases added).

The majority reaches this conclusion because it extends the definition of "other property," as set forth in the C.F.R., beyond its plain application. Majority op. at

42-43. Under the federal RSA, "other property" is defined as:

> Property which is not federal property and *on which vending machines are established* or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any federal property.

34 C.F.R. § 395.1(n) (emphasis added). Thus, "other property" means that if funds derived from the operation of vending facilities on any federal property are used to establish or operate a blind vendor facility on non-federal property, then the federal RSA applies.

But in the instant case *there is absolutely no evidence in the record* to conclude that the City received funds from federal property and used those funds to establish or operate vending facilities on City property. It is also *undisputed* that the State did not operate vending facilities on City property. Hence, any reliance by the majority on the federal RSA definition of "other property" in 34 C.F.R. § 395.1(n) is without factual basis in the record.

Additionally, the majority's reliance on the "overall scheme of the federal RSA," majority op. at 28, contradicts precise definitions in the law itself. "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and . . . *no clause, sentence, or word shall be construed as superfluous, void, or insignificant* if a construction can be legitimately found which will give force to and preserve all words of the statute." *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2002) (emphasis added).

The majority's holding that state courts are without subject matter jurisdiction necessarily requires a conclusion that Hawai'i's state and county properties fall within the definitional parameters of the federal RSA. This construction of the statute would render the limitations within the definitions of "federal property" and "other property" *nugatory,* contrary to the fundamental principle of statutory construction that no part of a statute shall be construed as superfluous or void.[9] *Indeed, under "the entire scheme" interpretation of the majority, "federal property" would include all state and county property in all participating states.*[10]

E. HRS § 347-12.5 Does Not Bring Hawai'i State Property Within the C.F.R.'s Definition of "Other Property"

The majority also places great reliance upon HRS § 347-12.5 as evidencing the "strong implication that the state and county properties fall within 'other property'

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[9] Such construction would also violate the maxim of expressio unius est exclusio alterius. *See Black's Law Dictionary* 581 (6th ed. 1990) (defining "expressio unius est exclusio alterius" as "[w]hen certain . . . things are specified in a law, . . . an intention to exclude all others from its operation may be inferred"). Here, the intention of the definitional limitation to exclude all others would be nullified by the inclusion of all state and county property.

[10] To support its "overall scheme" analysis, the majority quotes from *Delaware Dep't of Health & Soc. Servs. v. U.S. Dep't of Educ.*, 772 F.2d 1123 (3d Cir. 1985), for the implication that the federal vending program applies "to both federal and 'other buildings in [the] state.'" Majority op. at 30. The statutory language quoted in *Delaware Dep't of Health & Soc. Servs.*, Pub. L. No. 74-732, was repealed over fifty years ago and replaced with the terms "federal property" and "other property." *See* 68 Stat. 663 (1954).

because income generated from state and county vending facilities as well as federal facilities are deposited into one central account, from which funds may be used for the benefit of blind vendors in Hawai'i." Majority op. at 42-43. In other words, the majority contends that the enactment of HRS § 347-12.5 established that all state and county property would fall within the parameters of the federal RSA. Nothing in the legislative history of the statute indicates that the legislature intended any such effect.[11]

Instead, HRS § 347-12.5 merely created a revolving account. Significantly, the income generated from vending machines on state and county properties and the income generated from vending facilities on federal property must still, by law, be kept and distributed to blind vendors *separately.* Under the HAR, income from vending machines on federal property accrues only to blind vendors operating competing vending facilities on federal property.[12] *See* HAR § 17-402-17(n)(1). Likewise, income from vending machines on state property accrues only to blind vendors operating vending facilities on state

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[11] *See supra* note 1.

[12] Section 17-402-17(n)(1) states:

> Vending machine income from vending *machines on federal property,* which are in reasonable proximity to and in direct competition with any blind vendor, which has been disbursed to the state licensing agency, or instrumentality of the United States under the vending machine income-sharing provision of the Randolph-Sheppard Vending Stand Act *shall accrue to each blind [sic] federal property* in an amount not to exceed the average net income of the total number of blind vendors within the State, as determined each fiscal year. . . .

(Emphases added.)

property.[13] *See* HAR § 17-402-17(n)(2). If income from both state and federal properties was simply comingled into one account without being separately accounted for, it would be impossible for the DHS to distribute income as required by the HAR.

The rules do not indicate in any fashion, as the majority asserts, that federal funds are used to "provide management services, maintain and replace equipment, and purchase new equipment for vending facilities on non-federal property." Majority op. at 43. Rather, the rules simply outline the acceptable uses of funds collected from vending facilities. They also expressly require that funds generated on federal property and funds generated on state property are to be accounted for, distributed, and utilized separately.

In addition, less than a year prior to the adoption of HRS § 347-12.5, this court decided *Hawaii Blind Vendors*. That case explicitly held that state courts had jurisdiction over claims brought under HRS § 102-14 involving state property. *Id.* at 370-71, 791 P.2d at 1264; *see also infra* Part VI. It would have been anomalous for the legislature to have enacted a fundamental change in state law, superseding the decision in *Hawaii Blind Vendors* and

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[13] Section 17-402-17(n)(2) states:

> Vending machine income *from vending machines on state, city, or county property,* which are in reasonable proximity to and in direct competition with any blind vendor, *shall accrue to each blind vendor operating a vending facility on such property.* The state licensing agency shall retain vending machine income disbursed on all other state, city, or county property

(Emphases added.)

effecting a federal claim for all state and county property, without having indicated such intent in either the text of HRS § 347-12.5 or its committee reports.

But there are even more fundamental flaws with the majority's conclusion. The mingling of income into one account generated from state, county, and federal properties does not satisfy the C.F.R.'s definition of "other property." The definition of "other property" requires the property in question to be property "on which vending machines are *established or operated* by the use of any funds derived in whole or in part" from the operation of vending facilities on any federal property. 34 C.F.R. § 395.1(n) (emphasis added). Here, the record shows unmistakably that the claims in this case did not involve state or county property where the state licensing agency had established or operated vending machines.

The final flaw with the majority's reliance on HRS § 347-12.5 is that, even if this statute actually had the effect of bringing state and county properties within the federal RSA, it would not affect the litigation in this case. It would only have the effect of allowing a new federal claim for the Plaintiffs herein. Absent explicit divestment of the circuit courts' jurisdiction, *see supra* Part II(D), HRS §§ 102-14 and 661-1 would still allow a state claim to be brought under state law in state courts. That, of course, is what the Plaintiffs did in this case.

F. The HAR's Inclusion of a Definition of "Other Property" Fails to Support the Majority's Analysis

The majority also argues that, "[i]f we were to accept the dissent's flawed theory that the federal RSA applies to federal property and the Hawai'i RSA applies to state and

county property, there would have been no need for the DHS to define the phrase 'other property'." Majority op. at 44. The majority fails to recognize that HAR § 17-402-17 contains sections that apply specifically and exclusively to federal property, sections that apply specifically and exclusively to non-federal property, and sections that apply to both. Accordingly, the HAR includes a definition of "other property" in order to distinguish federal property from non-federal property.

The inclusion of this definition, in fact, undermines the majority's argument as it demonstrates that the DHS needed to differentiate between sections of the HAR that apply to federal property and those that apply to non-federal property. Indeed, under the majority's line of reasoning, if the federal RSA applies to all properties on which blind vendor facilities are operated, there would have been *no need* for such a distinction.

IV. THE FEDERAL ADJUDICATION PATH, EVEN IF APPLICABLE, DOES NOT LIMIT JUDICIAL REVIEW TO FEDERAL COURTS

The majority holds that "the overall scheme of the federal RSA dictates adherences to the federal adjudication path even in those situations involving non-federal property." Majority op. at 28. This holding is at odds with the weight of authority and is not supported by state or federal law. Even if one accepts this conclusion, however, the Plaintiffs' case is still properly before this court.

As characterized by the majority, the federal adjudication path consists of: "(1) a full evidentiary hearing at the state level before the SLA; (2) an opportunity to appeal the SLA decision to the USDOE for

review by an arbitration panel; and, finally, (3) *judicial review* of the USDOE's arbitration panel decision in the *federal courts*[.]" Majority op. at 10 (emphasis added). The majority fundamentally misapprehends both the nature and the effect of the federal adjudication path.

A. The Federal RSA Allows Judicial Review to Take Place in Any "Court of Competent Jurisdiction"

The majority maintains that judicial review under the federal RSA must take place solely and exclusively in the federal courts. Majority op. at 10. The federal RSA, however, does not limit judicial review to the federal courts. Instead, the federal RSA states merely that the arbitration decisions of the Secretary are subject to judicial review under the APA. *See* 20 U.S.C. § 107d-2(a). Under the APA, judicial review of agency decisions may take place in any "court of competent jurisdiction." 5 U.S.C. § 703. Judicial review, therefore, may take place in any court with jurisdiction over the claim. This includes state courts.

B. Federal Case Law Specifically Holds That Jurisdiction in State Courts is Valid Under the Federal RSA

Both the Sixth and Ninth Circuits have held that judicial review of arbitration decisions may take place in *state courts.* In other words, state courts are "courts of competent jurisdiction" for the purposes of the federal RSA. In *Premo,* the court said, "[T]he Act does not specifically designate federal courts as the proper tribunals for the enforcement of such awards. Blind vendors might be able *to bring suit in state court* to enforce

arbitration awards." 119 F.3d at 770 (emphasis added). Similarly, the Sixth Circuit, in *Tenn. Dep't of Human Servs.*, said of judicial review of a USDOE arbitration award, "A suit on the judgment *in state court* also is a possibility[.]" 979 F.2d at 1169 n.4 (emphasis added).

The Sixth and Ninth Circuits both caution that suits in state court to enforce arbitration awards under the federal RSA may bring into play state doctrines of immunity. *Premo,* 119 F.3d at 770, *Tenn. Dep't of Human Servs.*, 979 F.2d at 1169 n.4. In the instant case, however, there is no issue of state immunity from suit in the state courts. As discussed in Part II(D), the State has waived its sovereign immunity to suit for alleged violations of state law under HRS § 661-1, which vests jurisdiction for such a suit in the circuit courts of our state. Therefore, the circuit courts of this state are a proper component of the federal adjudication path as outlined by the federal RSA.

C. The RSA Statutes of Several States Allow for Judicial Review of Blind Vendors' Claims to Take Place in State Courts

The Randolph-Sheppard Acts of Colorado, Kentucky, and Ohio explicitly provide that blind vendors may seek judicial review in state court if they are dissatisfied with the results of a full evidentiary hearing conducted before the SLA. These states allow aggrieved vendors to seek judicial review *as an alternative to applying for arbitration before the Secretary.*[14] *See* 12 Colo. Code Regs. § 2513-1(9.411.2)

[14] The relevant provisions of the Colorado regulations read:

5. If a blind operator is dissatisfied with the decision rendered after a full evidentiary hearing, he or she may

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(2006); 782 Ky. Admin. Regs 1:010 § 7(2) and (3) (2006); Ohio Admin. Code 3304:1-21-13 (2005).

Other states, in their Randolph-Sheppard Acts, also deviate from the federal adjudication path as conceived by the majority. The California RSA, for instance, mandates state-controlled arbitration procedures in certain situations involving state property.[15] *See* Cal. Code Regs.

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request . . . that an arbitration panel be convened by filing a complaint with the Secretary of the Department of Education.

6. *If a blind operator is dissatisfied with the decision rendered after a full evidentiary hearing, he or she may also apply for a judicial review by the filing of an action for review in the appropriate State District Court*[.]

12 Colo. Code Regs. § 2513-1(9.411.2) (2006) (emphasis added).

The relevant provision of the Kentucky regulations reads:

(c) A vendor who is dissatisfied with the final agency decision entered in the evidentiary hearing may seek judicial review in accordance with the provisions of KRS Chapter 13B.

782 Ky. Admin. Regs 1:010 § 7(2) (2006) (emphasis added).

The relevant provision of the Ohio regulations reads:

(n) The licensee or applicant receiving the order shall also receive a statement that the order may be appealed in accordance with section 119.12 of the Revised Code. The licensee shall also be informed that a complaint may be filed as provided by section 107d of Chapter 6A of Title XX of the U.S.C.

Ohio Admin. Code 3304:1-21-13 (2005).

[15] The California RSA provides in relevant part:

(d) In the event the Director determines that any Federal agency having control of Federal property fails to comply with the applicable provisions of law and regulations and after all informal attempts to resolve the issues have failed, the Director may file a complaint with the Secretary, who may convene an arbitration panel. *If the failure to comply relates to State property,* the Director shall establish an

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tit. 9 § 7216 (2005). Ohio's RSA even more explicitly distinguishes between adjudication procedures for state and federal property by expressly providing that agency decisions involving state property may be directly appealed in state court.[16] Such provisions directly undermine the majority's assertion that "the overall scheme of the federal RSA . . . dictates adherence to the federal adjudication path even in those situations involving non-federal property." Majority op. at 28.

In order "to gain access to federal properties for their blind vendors to operate, [participating states] must submit a state vending facility plan that conforms with the requirements of the federal RSA and its regulations." Majority op. at 27. Section 395.4 of Title 34 of the C.F.R. mandates that all rules promulgated by an SLA must have been approved by the Secretary as part of the SLA

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arbitration panel, in accordance with Section 19627, Welfare and Institutions Code, to arbitrate the dispute.

Cal. Code Regs. tit. 9 § 7216 (2005).

[16] The relevant portion of the Ohio code provides that:

> If a dispute concerning the establishment of a suitable vending facility arises or if the bureau of services for the visually impaired determines that a *department, agency, or governmental unit in control of governmental property* has not complied with [the Ohio RSA], an administrative hearing shall be held. . . . The board's adjudication of the dispute shall be conducted in accordance with Chapter 119 of the Revised Code, and any order issued by the board shall be binding on both parties. An order issued by a board constituted under this section may be appealed in accordance with the procedure specified in section 119.12 of the Revised Code.

Ohio Rev. Code Ann. § 3304.32 (LexisNexis 2006). Ohio Rev. Code Ann. § 3304.28 defines "governmental property" as "any real property, building, or facility owned, leased, or rented by the state. . . ."

application process and must be adequate to assure the effective conduct of the State's vending facility program.

Pursuant to this regulation, the Secretary must have reviewed and approved the sections of the Colorado, Kentucky, California, and Ohio regulations allowing for judicial review in state court in lieu of arbitration before the Secretary. The only logical conclusion, therefore, is that state court review of a disputed evidentiary hearing is acceptable under the federal RSA as interpreted by the USDOE. This judicial review may take place prior to, or in place of, arbitration before the Secretary.

The majority's characterization of the federal adjudication path neither accounts for nor allows for any of these various state-law permutations of allowable grievance procedures. If the majority's understanding of the federal RSA is correct, all such provisions would be rendered invalid despite the fact that there is no indication that any of these provisions has ever been challenged. Clearly, the majority's narrow conception of the adjudication procedures allowed under the federal RSA is incorrect. As the foregoing indicates, the federal RSA does not supersede state court jurisdiction of claims brought under state statutes.

V. CONFERRING JURISDICTION OF STATE CLAIMS TO FEDERAL COURTS WOULD VIOLATE HAWAI'I LAW AND WELL ESTABLISHED PRINCIPLES OF AGENCY LAW

Neither HRS § 102-14 nor HRS § 347-12.5 can be read as delegating to the DHS the authority to divest the circuit courts of their jurisdiction over claims involving state law. Nevertheless, the majority asserts that HRS § 347-5 has

delegated such authority to the DHS. Majority op. at 37 n.21. Section 347-5 reads as follows:

> The [DHS] may, as the agency of the State for the assistance of blind or visually handicapped persons, do all things which will enable the State and the blind and the visually handicapped in the State to have the benefits of all federal laws for the benefit of blind and visually handicapped persons.

The majority's conclusion is flawed for three reasons: (1) the federal RSA does not require states to follow the federal adjudication path for disputes involving vending operations on state property;[17] (2) such a delegation by the legislature conflicts with the nondelegation doctrine adopted in this state; and (3) any divestment of jurisdiction by the DHS contravenes the legislature's express dictate that the DHS "adopt rules in accordance with chapter 91, necessary for the implementation of this section." HRS § 102-14(b).

A. Under the Hawai'i Constitution, Only the Legislature is Empowered to Establish Subject Matter Jurisdiction for Hawai'i Circuit Courts

Under the legislative power granted to it by article III, section 1 of the Hawai'i Constitution, "the legislature has the power to establish the subject matter jurisdiction of

[17] *See supra* Part II. As previously discussed, Eleventh Amendment considerations and the language of the federal RSA would also preclude federal court jurisdiction over a state law RSA claim.

our state court system.[18] The legislature has utilized such power by enacting HRS § 603-21.5." *Sherman v. Sawyer,* 63 Haw. 55, 57, 621 P.2d 346, 348 (1980).

> HRS § 603-21.5 gives the circuit court subject matter jurisdiction over civil actions and proceedings. *Thus, the circuit court has jurisdiction over all civil causes of action unless precluded by the State Constitution or by statute.*

Id. at 57, 621 P.2d at 348-49 (emphasis added). HRS § 661-1 gives the circuit courts jurisdiction over "[a]ll claims against the State founded upon any statute of the State." Thus, it is clear that, absent express legislative action to the contrary, the circuit courts have jurisdiction over the Plaintiffs' claim. Nothing in the legislative history of the Hawai'i RSA indicates that the legislature intended to divest the circuit courts of that jurisdiction.[19]

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[18] Article VI, section 1 of the Hawai'i Constitution provides in relevant part that, "[t]he several courts shall have original and appellate jurisdiction as provided by law."

[19] *See* Hse. Stand. Comm. Rep. No. 431, in 1981 House Journal, at 1117-18; Hse. Stand. Comm. Rep. No. 724, in 1981 House Journal, at 1240; Sen. Stand. Comm. Rep. No. 668, in 1981 Senate Journal, at 1200-01; Sen. Stand. Comm. Rep. No. 885, in 1981 Senate Journal, at 1295; Hse. Conf. Comm. Rep. No. 45, in 1981 House Journal, at 918; Sen. Conf. Comm. Rep. No. 47, in 1981 Senate Journal, at 927-28; Sen. Stand. Comm. Rep. No. 253, in 1987 Senate Journal, at 998-99; Sen. Stand. Comm. Rep. No. 580, in 1987 Senate Journal, at 1135; Hse. Stand. Comm. Rep. No. 912, in 1987 House Journal, at 1533-34; Hse. Stand. Comm. Rep. No. 1071, in 1987 House Journal, at 1619; Sen. Stand. Comm. Rep. No. 955, in 1993 Senate Journal, at 1123; Sen. Stand. Comm. Rep. No. 1178, in 1993 Senate Journal, at 1199; Sen. Conf. Comm. Rep. No. 140, in 1993 Senate Journal, at 803; Hse. Stand. Comm. Rep. No. 388, in 1993 House Journal, at 1125; Hse. Stand. Comm. Rep. No. 713, in 1993 House Journal, at 1267; Sen. Stand. Comm. Rep. No. 2717, in 1994 Senate Journal, at 1083-84; Sen. Stand.

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There are grave doubts, moreover, about whether the legislature has the power to delegate the authority to divest the circuit courts of jurisdiction over Plaintiffs' claims. Hawai'i has adopted the non-delegation doctrine as part of its constitutional law. *In re Kauai Elec. Div.*, 60 Haw. 166, 181, 590 P.2d 524, 535 (1978). Under this doctrine, the legislature "is not permitted to abdicate or to transfer to others the essential legislative functions" with which it has been vested by constitutional authority. *Nat'l Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974). The Hawai'i Constitution endows the legislature with the authority to establish subject matter jurisdiction. *Sawyer,* 63 Haw. at 57, 621 P.2d at 348. It is implausible that the authority to establish or divest jurisdiction is not an "essential legislative function," *Nat'l Cable Television Ass'n,* 415 U.S. at 342, that the legislature would be precluded from delegating to an administrative agency.

While neither the U.S. Supreme Court nor this court has specifically addressed the question of whether agency regulations may divest courts of jurisdiction granted to them by the legislature, several federal courts have held that they may not. *See Miller v. FCC,* 66 F.3d 1140, 1144 (11th Cir. 1995) ("It is axiomatic that Congress . . . could not delegate, the power to any agency to oust state courts and federal district courts of subject matter

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Comm. Rep. No. 2832, in 1994 Senate Journal, at 1121; Hse. Stand. Comm. Rep. No. 319-94, in 1994 House Journal, at 980; Hse. Stand. Comm. Rep. No. 815-94, in 1994 House Journal, at 1187; Sen. Stand. Comm. Rep. No. 2362, in 1996 Senate Journal, at 1118-19; Sen. Stand. Comm. Rep. No. 2739, in 1996 Senate Journal, at 1274-75; Hse. Stand. Comm. Rep. No. 356-96, in 1996 House Journal, at 1171-72; Hse. Stand. Comm. Rep. No. 639-96, in 1996 House Journal, at 1171-72; Hse. Conf. Comm. Rep. No. 121, in 1996 House Journal, at 1019-20.

jurisdiction[.]"); *United States v. Mitchell,* 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (questioning whether the Constitution "would permit Congress to delegate such a core legislative function as its control over federal court jurisdiction to any agency or commission").

The most logical and compelling position for this court to take would be for it to hold that the legislature lacks the constitutional authority to delegate to an administrative agency the authority to establish subject matter jurisdiction. Thus, even if the legislature did intend to delegate such authority to the DHS, DHS would be unable to divest the circuit courts of jurisdiction over the Plaintiffs' claims by virtue of constitutional law.

B. Any Agency Rule Establishing Jurisdiction in Federal Court Would be *Ultra Vires* and Invalid

Even if this court is unwilling to declare that agency rules may not divest state courts of statutorily-granted jurisdiction, nevertheless, the DHS lacked the authority to do so under the Hawai'i RSA. The majority asserts that HAR § 17-402-17(j) imports the federal adjudication path into state law thereby divesting state courts of jurisdiction to hear claims under the Hawai'i RSA. Majority op. at 43-45. Assuming, *arguendo,* that this is the actual intent of HAR § 17-402-17(j), such application of the rule would violate state law and well-established principles of agency law. The legislature, in HRS § 102-14(b), mandated that the DHS adopt rules in accordance with HRS chapter 91. Therefore, any rule adopted by the DHS that conflicts with chapter 91 must be declared invalid.

"It is axiomatic that agency rule-making authority arises from a legislative grant of power. Absent legislative

authority, an agency has no power to act." *Foytik v. Chandler,* 88 Hawai'i 307, 316, 966 P.2d 619, 628 (1998). "[T]he court shall declare [an agency rule] invalid if it finds that it . . . *exceeds* the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures." HRS § 91-7(b) (1993) (emphasis added). Here, the Hawai'i RSA does not give the DHS the power to confer the circuit court's jurisdiction on the federal district courts. Thus, if HAR § 17-402-17(j) attempts to divest the state courts of their jurisdiction, it is invalid.

There is nothing in HRS § 102-14 that indicates the legislature delegated to the DHS the authority to divest the circuit courts of subject matter jurisdiction for a claim filed under the Hawai'i RSA. Indeed, in HRS § 102-14(b), the legislature required the DHS to "adopt rules in accordance with [c]hapter 91, necessary for the implementation of this section." *See also* HRS § 102-14(d).

Chapter 91 specifically includes a provision that allows a claimant to appeal an adverse ruling by an agency to the circuit court. *See* HRS § 91-14. Thus, the legislature expressly provided that subject matter jurisdiction over a claim under the Hawai'i RSA by an aggrieved claimant would be in state circuit court. Nothing in the legislative history of the statute indicates that the legislature intended otherwise.[20]

When the legislature authorized the DHS to promulgate rules, it could not delegate to the DHS the power to establish a rule contrary to its enabling law. "[A]n

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[20] *See supra* note 18.

administrative rule cannot contradict or conflict with a statute it attempts to implement." *Hyatt Corp. v. Honolulu Liquor Comm'n,* 69 Haw. 238, 241, 738 P.2d 1205, 1206-07 (1987). Thus, the DHS was vested with the power to carry into effect the legislative will as expressed in the statute. Part of that express will was that regulations adopted by the DHS be in accord with HRS chapter 91. The legislature did not limit this mandate to select portions of chapter 91. Hence, any rule adopted by the DHS that contradicts the provisions of chapter 91 is invalid because it conflicts with the explicit language of HRS § 102-14(b). *Id.*

Moreover, "the legislature is presumed to know the law when enacting statutes[.]" *Agustin v. Dan Ostrow Constr. Co.,* 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981). Thus, the legislature, in specifically referencing chapter 91, must be presumed to have been aware that chapter 91 contains no provision giving a state agency the power to divest the circuit courts of jurisdiction. The legislature must also have been cognizant of HRS § 91-14(a), which provides that "[a]ny person aggrieved by a final decision and order in a contested case . . . *is entitled to judicial review thereof under this chapter.*" (Emphasis added.) In turn, HRS § 91-14(b) provides that judicial review shall take place in the circuit court.

The legislature mandated in HRS § 102-14(b) that rules were to be adopted in accordance with chapter 91. Chapter 91 specifically provides for judicial relief in the "circuit court" for persons aggrieved by an agency declaratory ruling or a decision in a contested case. *See* HRS § 91-7(a). The legislature has, therefore, vested jurisdiction in the circuit court for a claim arising under the Hawai'i RSA. Any contention that HAR § 17-402-17

divests the circuit court of that jurisdiction is in direct conflict with the plain language of the statute.

The majority argues, however, that the provisions of HRS chapter 91 can be divided into separate rule-making and adjudicatory provisions. Majority op. at 38-39. The majority then asserts that, "had the legislature intended that the adjudicatory provisions of [c]hapter 91 be followed, it would have expressly indicated such intent. . . ." Majority op. at 39. It is, however, a cardinal rule of statutory interpretation that:

> [T]he starting point in statutory construction is to determine the legislative intent from the language of the statute itself. Indeed, absent any constitutional obstacles in applying the law, this court's chief duty is to ascertain and give effect to the legislature's intention to the fullest degree, which is obtained primarily from language contained in the statute itself. When a law is enacted, a presumption exists that the words in the statute express the intent of the legislature.

Morgan v. Planning Dep't. County of Kaua'i, 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004) (citations, internal quotation marks, and brackets omitted).

Also, "[t]he words of a statute are to be generally understood in their most common, general, or popular definition." *Singleton v. Liquor Comm'n, County of Hawai'i,* 111 Hawai'i 234, 243, 140 P.3d 1014, 1023 (2006) (citing HRS § 1-14). "Where a term is not statutorily defined[, a court] may rely upon extrinsic aids to determine such intent. Legal and lay dictionaries are extrinsic aids which may be helpful in discerning the meaning of statutory terms." *Id.* at 243-44, 140 P.3d at 1023-24.

"Accordance" is defined as "agreement; conformity." *Random House Webster's Unabridged Dictionary* 12 (2d ed. 1998). The legislature's mandate in HRS § 102-14(b) that rules be adopted "in *accordance* with [c]hapter 91," (emphasis added), must, therefore, be read as requiring that the rules adopted agree or conform with chapter 91. The legislature did not distinguish in HRS § 102-14(b) between the rule-making and the adjudicatory provisions of the chapter. Nor did the legislature state that the rules should be adopted in accordance with only the rule-making provisions of chapter 91 as the majority proposes. And, nothing in the legislative history of HRS § 102-14 indicates that the legislature intended to limit the scope of its mandate.[21] Instead, on its face, the statute directs the DHS to adopt rules that agree or conform to chapter 91, which can only reasonably be construed as referring to the entire chapter, including those sections establishing adjudicatory procedures.

Nonetheless, the majority speculates that the legislature did not mean what it expressly said, but intended something different, something not stated in the statute itself. The majority lists a number of statutes where the legislature was silent as to the adoption of chapter 91's adjudicatory provisions. Majority op. at 40-41. The majority then asserts that this silence is to be read as meaning that "the agency has the discretion to decide whether to adopt the adjudicatory provisions of HRS chapter 91 when promulgating its administrative rules." *Id.* To the contrary, however, in each of the listed examples the administrative agency established rules in conformity

[21] *See supra* note 18.

with both the rule-making and the adjudicatory provisions of chapter 91. *See* Hawaiian Homes Commission Act § 222 (Supp. 2005); HAR § 10-5-32; HRS § 448B-3(2) (Supp. 2005); HAR § 11-79-13f.

Finally, the majority's argument presumes that the legislature's failure to expressly mandate that the DHS adopt the adjudicatory provisions of chapter 91 automatically renders those provisions inapplicable to the Hawai'i RSA. This is simply not the case. The adjudicatory provisions of chapter 91 do not depend on the adoption of agency rules to become operative. Rather, chapter 91 expressly provides the jurisdictional route to the circuit court following a final agency decision. *See* HRS § 91-14(a). No "adjudicatory rule" was required to be adopted in order to enable an aggrieved party to exercise its statutory right to appeal to the circuit court pursuant to HRS § 91-14(a).

Indeed, if the majority's understanding of the relationship between chapter 91, HRS § 102-14, and HAR § 17-402-17(j) were correct, numerous state agencies would have the blanket power to eliminate an aggrieved person's right to appeal an adverse final decision to the circuit court simply by repealing or amending their rules. Additionally, the rules adopted by the DHS pursuant to HRS § 102-14(b) would not be subject to challenge by an aggrieved person. *See* HRS § 91-7. A statutory interpretation that eliminates the ability to challenge in state court a state agency rule adopted pursuant to state law "produces an absurd [and] unjust result." *In re Wai'ola O Moloka'i,* 103 Hawai'i 401, 425, 83 P.3d 664, 668 (2004).

The plain language and legislative history of HRS § 102-14(b) neither leads to nor supports such a result. Any contention that state courts have no jurisdiction with

respect to HRS § 102-14(b) is belied by chapter 91 and by fundamental principles of statutory construction.

VI. THE MAJORITY ERRONEOUSLY OVERRULES A HAWAI'I SUPREME COURT DECISION THAT HAD EXPRESSLY HELD THAT HAWAI'I COURTS HAVE JURISDICTION OVER A STATE RSA CLAIM

As in this case, *Hawaii Blind Vendors* involved state claims brought under the Hawai'i RSA, HRS § 102-14. In *Hawaii Blind Vendors,* this court ruled that state courts have jurisdiction over state RSA claims. That decision is today overruled on the grounds that "subject matter jurisdiction was never raised," and, therefore, the "court was not given the opportunity to examine the overall federal scheme and its relationship to the Hawai'i RSA." Majority op. at 54. That, however, cannot be correct.

In *Hawaii Blind Vendors,* Maka'ala, a non-profit corporation that gave employment preference to handicapped persons, leased airport space for a retail concession. 71 Haw. at 370, 791 P.2d at 1263-64. The DHS renewed Maka'ala's airport lease without providing notice of the vacancy or an opportunity to apply for the vacancy to blind or visually impaired vendors. *Id.* The beneficiaries of the blind vendor program brought an action in the circuit court of the first circuit claiming violations of the substantive and procedural law governing the priority program. *Id.* at 368, 791 P.2d at 1263. The DHS contended that the beneficiaries were required to exclusively bring their action through a DHS administrative hearing and could not bring an original action in the circuit court for injunctive and declaratory relief. *Id.* at 370-71, 791 P.2d at 1264. The circuit court granted summary judgment

against the beneficiaries and they appealed. *Id.* at 368, 791 P.2d at 1263.

This court concluded that it was not necessary to resolve the question of whether the beneficiaries could bring an original action in the circuit court of the first circuit for the relief sought, and stated as follows:

> [W]e need not decide this issue. Under the doctrine of primary jurisdiction, *when a court and agency have concurrent original jurisdiction to decide issues* which have been placed within the special competence of an administrative agency, the judicial process is suspended pending referral of such issues to the administrative body for its views. Thus, *the DHS agency process,* if available, is the appropriate forum *for an initial determination of the issues* raised in this case.

Id. at 371, 791 P.2d at 1264 (emphasis added) (internal citation omitted). Accordingly, this court found that the circuit court had concurrent original jurisdiction with the DHS to resolve the action brought under HRS § 102-14 and HAR § 17-402-17. *Id.* Based upon the conclusion of "concurrent original jurisdiction to decide issues" with the DHS, the case was not dismissed; instead it was duly remanded to the DHS for a full and fair agency hearing "for an *initial* determination of the issues raised in the case."[22] *Id.* (emphasis added). The case was remanded for an "initial determination" precisely because following the agency decision, the circuit court would have had jurisdiction to consider an appeal from the DHS's decision.

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[22] In *Hawaii Blind Vendors,* 71 Haw. at 371-74, 791 P.2d at 1264-66, this court also determined that the ninety day time bar of HAR Rule 17-400-4(2)(G) did not bar the beneficiaries' action.

Any contention that this court did not consider subject matter jurisdiction is belied by this court's holding that the circuit court had concurrent jurisdiction to decide the case. "Concurrent jurisdiction" is defined as follows:

> The jurisdiction of several different tribunals, *each authorized to deal with the same subject-matter* at the choice of the suitor. Authority shared by two or more legislative, judicial, or administrative officers or bodies to deal with the same subject matter.

Black's Law Dictionary 291 (6th ed. 1990) (emphasis added). "Subject matter jurisdiction" is defined as follows:

> A *court's power to hear and determine cases* of the general class or category to which proceedings in question belong; the power to deal with the general subject involved in the action.

Id. at 1425 (emphasis added).

This court's conclusion that the circuit court had concurrent jurisdiction to decide the issues raised in *Hawaii Blind Vendors* was unequivocally a determination of subject matter jurisdiction over the case. In order to conclude concurrent jurisdiction, the court in *Hawaii Blind Vendors* had to have determined the question of subject matter jurisdiction and decided that the circuit court had jurisdiction over the statutory claim.

Furthermore, in order to dismiss the instant case for lack of subject matter jurisdiction, the majority is compelled to conclude that Hawaii's legislature intended to confer state jurisdiction over state claims to federal court. However, if this had been the legislative intent, then the legislature would have acted in response to this court's decision in *Hawaii Blind Vendors,* as HRS § 102-14 was

cited as the authorizing statute for HAR § 17-402-17, which was the basis for a state administrative hearing. *Cf. Gorospe v. Matsui,* 72 Haw. 377, 381, 819 P.2d 80, 82 (1991) (where the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature). Nothing has been enacted into law since the decision in *Hawaii Blind Vendors* that indicates the legislature intended to supersede the decision in that case or that the case was wrongly decided. Nevertheless, today the majority overrules that decision based upon an erroneous construction of the federal RSA as set forth herein.

VII. NO STATE COURT HAS EVER DISMISSED A CASE FOR LACK OF SUBJECT MATTER JURISDICTION OVER A STATE RSA CLAIM, AND CONVERSELY, NUMEROUS STATE APPELLATE COURTS HAVE EXERCISED JURISDICTION IN SUCH CASES

It bears repeating that only federal law can provide the basis for federal jurisdiction. As mentioned before, in the majority's view, it is the "entire scheme" of the federal RSA that divests state courts of jurisdiction over state claims involving state property. The consequence of this ruling is that since nearly all states participate in the federal RSA program, the federal RSA governs not only all federal property, but virtually all state and county property as well. This also means that no state court would have jurisdiction to decide a state RSA claim based on state law.

As noted, no state court has ever so held. Indeed, it appears that no state appellate court has ever endorsed

the proposition that it lacked subject matter jurisdiction to decide an issue under a state RSA law. Conversely, numerous state courts have exercised subject matter jurisdiction in cases involving blind vendors operating on state or county property.

Kentucky, like Hawai'i and numerous other states, has enacted a state RSA statute to establish a vending facilities program in state buildings for qualified blind persons. In *Kentucky State Univ. v. Kentucky Dep't for the Blind,* 923 S.W.2d 296 (Ky. App. 1996), it was undisputed that Kentucky State University fell within the purview of Kentucky's RSA statute. *Id.* at 297. The Kentucky Court of Appeals upheld the lower court's decision as to the program's right to product and supplier selection but reversed the circuit court's holding regarding a blind vendor's right of first refusal concerning site selection. *Id.* at 300. While the Court of Appeals found federal law "instructive" and turned to it "for guidance," *id.* at 298-99, the court definitively exercised subject matter jurisdiction over the case in rendering its decision.

Marlar v. State of Arizona, 666 P.2d 504 (Ariz. Ct. App. 1983), involved a food service facility in the State Education Building. Under its state RSA law, Arizona had established a vending facilities program for the blind on state, county, and municipal property. *Id.* at 506 (citing Ariz. Rev. Stat. Ann. § 23-504.A (West 2006)). The plaintiff successfully brought suit in superior court claiming that he had been improperly transferred to another facility without his consent. *Id.* at 508. On appeal, the state agency defendant contended that the superior court lacked jurisdiction to consider plaintiff's complaint because plaintiff failed to join the director of the agency as a party. *Id.* The Arizona Court of Appeals rejected the

jurisdictional challenge and ruled that the director was not an indispensable party and affirmed the judgment of the lower court, manifestly exercising subject matter jurisdiction in reaching its decision. *Id.*

Glanz v. McCray, 881 P.2d 766 (Okla. Civ. App. 1994), involved vending facilities at the Tulsa County Courthouse. Pursuant to Oklahoma's RSA law, local and state authorities must give priority to the blind to operate vending facilities. *Id.* at 767 (citing Okla. Stat. Ann. § 73 (West 2006)). The district court issued a writ of mandamus in favor of the manager of the vending facilities at the courthouse and the Department of Human Services requiring the sheriff's department to allow the blind vendor program to operate the jail commissary. *Id.* at 767. Among the grounds raised on appeal was that the trial court lacked personal jurisdiction over the sheriff's department. *Id.* The Court of Appeals of Oklahoma ruled that the trial court did not err in denying the various challenges to personal jurisdiction. *Id.* at 767-68. Subject matter jurisdiction was necessarily exercised in order for the appellate court to reach its decision.

Louisiana adopted a state RSA law that required state agencies, board commissions and institutions owning, maintaining or controlling state property to give preference to blind persons in the operation of vending stands. LSA R.S. 46:333. In *Copsey v. Joint Legislative Budget Council,* 607 So. 2d 841 (La. App. 1992), the Court of Appeal of Louisiana held that the lower court erred in granting a writ of mandamus to a blind vendor challenging a lease of space in the state capitol in view of the plaintiff's delay in bringing suit and because injunctive and declaratory relief actions were also brought.

Id. at 843. The Louisiana appellate court plainly rendered its decision on the merits.

In *Gundy v. Ozier,* 409 So. 2d 764 (Ala. 1981), the Alabama Supreme Court construed an Alabama RSA law that gave preference to licensed blind persons in the operation of vending machines on state property. *Id.* at 765 (citing Ala. Code §§ 21-1-40 and -41 (West 2006)). The dispositive question on appeal was the extent of the preference given in the statute to blind persons. *Id.* at 766. The Alabama Supreme Court decided the issue by determining the legislative intent of the Alabama legislature and finding additional support for its conclusion in federal case law. *Id.* at 766-67.

It is significant that the majority's decision in this case results in the federal court having the sole authority to determine the intent of the Hawai'i legislature regarding the issue of statutory construction of a Hawai'i law. One impact of the majority's decision is that the Hawai'i Supreme Court would have no authority to determine whether a state law or administrative agency rule concerning the blind vendor program violated our state constitution. This is not an abstract possibility. In *West Virginia v. Casey,* 232 S.E.2d 349 (W.V. 1997), the Supreme Court of Appeals of West Virginia considered a West Virginia statute, W. Va. Code Ann. § 18-10G-3 (West 2006), that provided for rent-free use of state, county, and city property by the West Virginia Society for the Blind and Severely Disabled for purposes of operating food services to enlarge employment opportunities for the disabled. The court held that the statute was an *unconstitutional* grant of the credit of the state to, or in aid of, a private corporation. *Id.* at 352.

No Hawai'i citizen challenging a state statute or state rule as contrary to the Hawai'i Constitution should be compelled to bring a suit in federal court to obtain a ruling on the legality of a Hawai'i statute or rule. Nor should a Hawai'i citizen be placed in the precipitous position of trusting that the federal court will correctly determine constitutionality under Hawai'i law.

The majority may contend that none of the decisions discussed above directly addressed subject matter jurisdiction. It is counterintuitive, however, to conclude that in all of these cases, all of the lower and appellate courts, and all of the parties and counsel overlooked the issue of lack of subject matter jurisdiction. Instead, it is far more likely that lack of subject matter jurisdiction by a state court over a state claim was determined not to be a viable issue by the parties, counsel and the courts in each of these cases.

VIII. NONE OF THE FEDERAL DECISIONS RELIED UPON BY THE MAJORITY INVOLVE A STATE CLAIM BROUGHT UNDER A STATE RSA LAW AND THEREFORE THESE CASES ARE INAPPOSITE

The majority relies on four federal cases to demonstrate that its "conclusion is consistent with federal case law, where federal courts have reviewed decisions rendered by an ad hoc arbitration panel convened by the Secretary involving certain states' blind vendors programs." Majority op. at 31. None of these cases, however, involved state claims brought under state RSA laws. Instead, they involved *federal* claims brought under the federal RSA where the federal adjudication path was applicable. In each of these cases the resolution of the

dispute had potential effects on vendors operating on both state and federal property. It must be noted, moreover, that not a single one of these cases held that a state court would have lacked jurisdiction to adjudicate the dispute. Therefore, these cases provide no authority for determining that a state court lacks jurisdiction over a state RSA claim based on a state law, as the majority contends.

Smith v. Rhode Island State Servs., 581 F. Supp. 566 (D. R.I. 1984), involved state rules and regulations adopted by the Rhode Island state licensing agency. Under federal regulations, an application for designation as a state licensing agency must contain a plan outlining the rules and regulations applicable to the blind vendor program that is administered by the state. *Id.* at 568 (citations omitted). The rules and regulations that were the basis of the controversy in *Smith,* involving the method of selection, transfer and promotion of vendors, had been approved by the federal government. *Id.* at 569. Neither a state claim under a state RSA law, nor state court jurisdiction, was at issue in *Smith.*

In *McNabb v. U.S. Dep't of Educ.*, 862 F.2d 681 (8th Cir. 1988), the United States Court of Appeals for the Eighth Circuit concluded that a federal arbitration panel could not award a blind vendor retroactive money damages against Arkansas pursuant to the federal RSA, although prospective damages and equitable relief could be awarded. *Id.* at 683-84. In *McNabb,* the blind vendor followed the adjudication path provided for in 20 U.S.C. § 107d-1(a), a federal law. *Id.* at 682-83. The case did not involve a concurrent state court action nor did it reference any state RSA law.

Delaware Dep't of Health & Soc. Servs. also involved federal regulations promulgated pursuant to the federal RSA requiring state licensing agencies to establish and maintain policies to govern transfer and promotion of vendors. In compliance with federal regulations, Delaware's rules set forth regulations dealing with the transfer and promotion of blind vendors. 772 F.2d at 1131-32. The application of these regulations in determining whether a particular vendor was the most senior qualified applicant formed the basis of the dispute in the case. *Id.* The applicant vendor prevailed during the arbitration process and was awarded compensatory damages and attorney's fees. *Id.* at 1132. The federal appeals court affirmed the award, reversing the district court's judgment that had vacated the award. *Id.* at 1140. Again, state jurisdiction over a state claim under a state RSA was not involved.

Finally, in *Fillinger v. Cleveland Soc'y for the Blind,* 587 F.2d 336, 337 (6th Cir. 1978), the Ohio Rehabilitation Services Commission supervised a blind vending program established pursuant to the federal RSA. In determining that the aggrieved blind vendors were required to exhaust their administrative remedies before seeking review in the district courts, the United States Court of Appeals for the Sixth Circuit interpreted only federal law. *Id.* at 337-38. There was no discussion whatsoever of an Ohio counterpart to the federal RSA, or of federal jurisdiction over a state claim.

In summary, none of the federal cases cited by the majority are relevant to support its conclusion that a state court does not have subject matter jurisdiction over a claim brought under a state RSA law.

IX. THE ONLY FEDERAL DECISION THAT DISCUSSED WHETHER A STATE'S PARTICIPATION IN THE FEDERAL - RSA WOULD CONFER FEDERAL JURISDICTION OVER A STATE CLAIM HAS STRONGLY INDICATED THAT IT WOULD NOT SO CONFER

The notion that a state's participation in the federal RSA, which requires creation of a state licensing agency and acceptance of the federal adjudication path, would confer federal jurisdiction over state claims involving state property under a state RSA has been, at a minimum, implicitly rejected by one federal court. In *Ramsey,* the United States Court of Appeals for the First Circuit addressed New Hampshire's compliance with the federal RSA's requirement that "priority" be given to blind vendors in operating vending machine operations in rest areas along federally funded interstate highways. 366 F.3d at 4.

The First Circuit noted that the case was governed by two federal statutes, the federal RSA and the Surface Transportation Assistance Act (STAA). *Id.* at 5-7. Under the STAA, a state cannot accept federal highway funds without entering into an agreement with the Secretary of Transportation that includes a promise to comply with a priority system for vending machines operated on the interstate highway system. *Id.* at 7 (citations omitted). Unlike the federal RSA, the STAA specifically includes rights-of-way on state property of the Interstate system. *Id.* at 7 (citing 23 U.S.C. § 111(b)).

The plaintiffs (Blind Vendors) filed an action under 28 U.S.C. § 1331 against several New Hampshire state defendants alleging that New Hampshire was violating 23 U.S.C. § 111(b) of the STAA by failing to give them priority

to vending facilities operated through the state licensing agency (SLA). *Id.* at 9. A similar action was also filed in a New Hampshire state court. *Id.* The Blind Vendors requested an injunction requiring that all existing contracts to operate vending facilities be voided and that the state grant the right to operate those facilities to licensed blind vendors. *Id.* The state filed a motion to dismiss arguing that the Blind Vendors had not exhausted their administrative remedies before filing a judicial action and that the Blind Vendors' claims could be more readily resolved in state court. *Id.* at 9-10. The First Circuit noted that in the state's motion, "the state conceded that even if the claim could not go forward in federal court, *the state court proceeding could go forward.*" *Id.* at 10 (emphasis added).

The federal court dismissed the Blind Vendors' claim without prejudice finding that they had failed to exhaust their administrative remedies. *Id.* At the administrative hearing, the state contended that the rest areas were on "state, not federal, property and so are not subject to the [federal RSA]." *Id.* at 11. The Blind Vendors "did not dispute that the [federal RSA] applies only to federal land." *Id.* Instead, the Blind Vendors argued that § 111(b) of the STAA clearly applied to rest areas on both state and federal land. *Id.*

The Blind Vendors prevailed at the administrative hearing, on appeal to the USDOE arbitration panel, and in the federal district court. The First Circuit framed the issue as "whether the vending machines to which Section 111(b) refers are within the vending facility program described in the [federal RSA]." *Id.* at 23. The court concluded that the "vending machines" were within "the

vending facility program" based on the plain language of the federal RSA and 23 U.S.C. § 111(b). *Id.*

The First Circuit then added the following significant footnote regarding vending facilities located on state properties:

> *SLAs sometimes operate vending machines outside the [federal RSA]. . . . Among those functions is the operation of vending machines on state property under the state's "mini" – R-S Act. But, to the extent that SLAs operate those machines, they do so in their general capacity as agencies of the state, not in their capacity as licensing agencies designated under the [federal RSA].*

Id. at 23 n.23 (emphasis added) (internal citations omitted).

Applying the analysis of the *Ramsey* court to the instant case, *the DHS, when administering the operation of vending machines on state property, acts in its general capacity as an agent of the state,* and not in its capacity as a licensing agency designated under the federal RSA. Therefore, federal court jurisdiction under the federal RSA is not implicated in this case.

It is revealing to compare the State of New Hampshire's position in *Ramsey* to the State's position in the instant case. The defendants in *Ramsey* "conceded that even if the claim could not go forward in federal court, the state court proceeding could go forward."[23] *Id.* at 10.

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[23] The State in the instant case did not dispute subject matter jurisdiction until after the case had proceeded to verdict, was appealed, the appeal was dismissed for lack of finality of judgment, and the case

(Continued on following page)

Further, all parties in *Ramsey* agreed that the federal RSA did not apply to state property. Moreover, the footnote by the *Ramsey* court plainly indicates its agreement that the operation of vending machines on state property by a SLA is not done in the SLA's capacity as a licensing agency under the federal RSA, and therefore federal jurisdiction does not lie. The majority's holding in this case is in direct conflict with the conclusion of the *Ramsey* court.

X. CONCLUSION

In reaching its decision to dismiss this case for lack of subject matter jurisdiction, I believe, with all due respect, that the majority has made numerous erroneous pronouncements upon the law. These include the following holdings:

(1) The federal RSA applies to virtually all state and county property in the United States, despite explicit language in the statute itself that restricts its scope, its Congressional history to the contrary, and the uniform disagreement of state and federal courts;

(2) Eleventh Amendment immunity may be "implicitly surrendered," despite federal and state precedent that requires waiver to be express, explicit, and unequivocal, thereby setting a very low bar for determining that the State has waived its sovereign immunity;

(3) A claim based on a state law cannot be brought in a state court despite federal preemption not being invoked,

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was remanded to the circuit court. Only then did the State raise the issue of subject matter jurisdiction.

meaning federal courts will have exclusive jurisdiction over a state RSA claim, and the sole authority to interpret Hawaii's RSA law, the applicable state agency rules, and the Hawai'i Constitution as it relates to issues involving the Hawai'i RSA;

(4) The statutory mandate to "adopt rules in accordance with [c]hapter 91" is construed to mean that an agency can adopt adjudicatory rules or take actions that conflict with specific statutes in chapter 91, allowing numerous state administrative agencies unprecedented discretion in deciding whether to adopt the adjudicatory proceedings of HRS chapter 91 and eroding statutory rights provided to aggrieved claimants by chapter 91; and

(5) Overruling *Hawaii Blind Vendors,* a case that had held there was subject matter jurisdiction to decide a claim under the Hawai'i RSA, on the premise that subject matter jurisdiction was never raised in that case, although this court had specifically concluded in its decision that the circuit court had concurrent jurisdiction with DHS over the claim.

For the reasons stated above, I do not agree with the majority's holding and have great concern for the precedent established by its decision. I would conclude that this court does have subject matter jurisdiction over Plaintiffs' claims under the Hawai'i RSA and reach the merits of the appeals in this case.

/s/ [Illegible]

/s/ Richard W. Pollack

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIMURA,

Plaintiffs,

vs.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAII; JON L. KOKI, in his capacity of Business Manager for Ho'opono, NEIL SHIM, in his capacity of Administrator of the Division of Vocational Rehabilitation State of Hawaii Department of Human Services; DAVE EVELAND, in his capacity of Administrator of the Services to the Blind branch of the State of Hawaii Department of Human Services; SUSAN CHANDLER, in her capacity as Director of the State of Hawaii Department of Human Services, and the CITY AND COUNTY OF HONOLULU,

Defendants.

FIRST CIRCUIT
COURT CIVIL NO.
96-3011-07 (EEH)
(Other Civil Action)

FINAL JUDGMENT

(Filed Aug. 22, 2001)

FINAL JUDGMENT

It is hereby adjudged and decreed that

1. a. There were no parties to this action (Civil No. 96-3011-07) other than Plaintiffs, Defendant City and County of Honolulu (Defendant City), and Defendants Department of Human Services, Jon L. Koki, Neil Shim, Dave Eveland, and Susan Chandler (collectively the State of Hawaii Defendants).

b. This court's July 15, 1999 order granted the joint request of Plaintiffs and Defendant City for class action under Hawaii Rules of Civil Procedure 23(a)(b)(2), (c), (d) and (e) and 54.

c. This action was consolidated with two agency administrative appeals (First Circuit Civil Nos. 97-2826 and 97-3201 [originally Third Circuit Civil No. 97-342] by order of October 21, 1977. The petitioner in agency appeal 97-2826 was the City and County of Honolulu. The petitioner in agency appeal 97-3201 was the County of Honolulu. The respondents in both agency appeals were Susan Chandler and the State of Hawaii Department of Human Services.

The two agency appeals were dismissed pursuant to Hawaii Rules of Civil Procedure 41(a)(1)(B) by the stipulation of partial dismissal filed October 12, 1999.

d. As between Plaintiffs and Defendant City, judgment is entered as of July 15, 1999 in favor of Plaintiffs and against Defendant City in accord with the Settlement Agreement between Plaintiffs and Defendant City approved by this court's July 15, 1999 order.

e. The Settlement Agreement approved by this court required Plaintiffs and Defendant City to dismiss their claims against each other, each party to bear its own attorneys' fees and costs as to each other. The dismissal required by the approved Settlement Agreement was effectuated by the Stipulation of Partial Dismissal between Plaintiffs and Defendant City filed ___.

2. As between Plaintiffs and the State of Hawaii Defendants, judgment as to liability is entered in favor of Plaintiffs and against the State of Hawaii Defendants in accord with this court's March 14, 2000 order granting Plaintiffs' motion for partial summary judgment filed on January 6, 2000, this court's March 14, 2000 order denying the State of Hawaii Defendants' motion for summary judgment filed on January 6, 2000, and this court's April 18, 2001 order denying the State of Hawaii Defendants' motion to dismiss for lack of subject matter jurisdiction.

3. As between Plaintiffs and the State of Hawaii Defendants, the remaining non-liability issues in the case were tried to the court in August 2000. The court entered its findings of fact and conclusions of law on September 27, 2000.

As between Plaintiffs and the State of Hawaii Defendants, it is hereby adjudged and decreed that judgment shall be entered forthwith in favor of Plaintiffs and against the State of Hawaii Defendants in the amount of $3,676,922.00 plus reasonable attorneys' fees and costs of this litigation.

a. This amount consists of the figure calculated by Dr. Suyderhoud through his five step analysis minus the $150,000.00 offset representing the amount received

by Plaintiffs from the settlement with the City & County of Honolulu.

b. The net proceeds of the surcharge award against the State of Hawaii Defendants and in favor of Plaintiffs shall be directly deposited into the Randolph-Sheppard revolving account, HRS § 347-12.5 for the benefit of all blind vendors in the State of Hawaii. By the term "net proceeds" this Court means the total amount of the surcharge paid by the State of Hawaii Defendants to Plaintiffs plus any post-judgment interest, less attorneys' fees and costs, all as approved or to be approved by this Court.

4. As between plaintiffs and the State of Hawāii Defendants, it is also adjudged and decreed that the declaratory and other equitable relief shall be entered as part of this judgment and shall be entered in favor of Plaintiffs and against Defendants as follows:

a. First, the court orders the State of Hawaii Defendants to hire, retain or otherwise employ a qualified investment adviser who must be licensed to do business in the State of Hawaii, be bonded or insured in amounts which are standard in the industry in Hawaii; and, must have at least ten years experience in such field together with appropriate education and training. The investment advisor must be fully qualified to manage and invest all funds in the Randolph-Sheppard Revolving Account. Such investment advisor must be hired, retained, or otherwise employed within 120 days of the entry of Judgment herein. The investment adviser must be acceptable and approved by the Hawaii State Committee of Blind Vendors in order to be finally hired, retained, or employed. Fees for the

services of the investment adviser shall be paid from the Randolph-Sheppard Revolving Account. If such investment advisor is not hired because the Hawaii State Committee of Blind Vendors has not accepted and approved the hiring, the dispute shall be resolved by binding arbitration consistent with Chapter 658, by motion made to this Court by any party.

b. Second, the State of Hawaii Defendants shall ensure that each blind vendor shall receive, at least on quarterly basis, a complete report from the investment adviser of the status of the fund, which the adviser is investing.

c. Third, the State of Hawaii Defendants shall provide to each blind vendor an annual report setting the preceding year's performance with respect to the vending machine program and setting forth detailed strategies for the following year.

d. Fourth, within 90-days of the date on which the investment adviser is hired, in conjunction with the State of Hawaii Defendants, a 10-year plan must be developed for the use and distribution of the monies invested in the Randolph-Sheppard account.

e. Fifth, within 60-days of the date on which the investment adviser is hired, the State of Hawaii Defendants must also prepare or cause to be prepared at their own cost, a retirement and health plan for the Plaintiffs. Such plan must provide adequate coverage for the period when the Plaintiffs are blind vendors and must also provide for health coverage when the blind vendor retires.

f. Sixth, the State of Hawaii Defendants, must hire, retain or employ a qualified expert in the vending machine field who is required to produce recommendations that provide specific guidance to the State of Hawaii Defendants on: how to expand the sites for vending machines; how to expand the product line for vending machines; and any other recommendations, which will streamline and increase the operations and efficiency of the vending machine program. This expert must be hired within 60-days of the date of the judgment herein and his or her hiring, retention, or employment is subject to approval by the Hawaii State Committee of Blind Vendors. Fees for the service shall be paid from the Randolph-Sheppard Revolving Account. All recommendations of this expert must be provided in writing to the Hawaii State Committee of Blind Vendors. If approved by the Committee and the State of Hawaii Defendants, then the recommendations shall be acted on forthwith. If the recommendations are not agreed upon, the dispute shall be resolved by binding arbitration consistent with Chapter 658, by motion to this Court by any part.

5. a. All claims as to all parties have been adjudicated. The two agency appeals were dismissed by stipulation. All claims as between plaintiffs and Defendant City were dismissed by stipulation. There are no remaining claims as between Plaintiffs and Defendant City and County of Honolulu. All claims as between plaintiffs and the State of Hawaii defendants were adjudicated by motion or at trial. There are no remaining claims as between plaintiffs and any of the five State of Hawaii Defendants. No party to this action or to either of

the agency appeals filed any counterclaim, cross-claim, or third-party claim.

DATED: Honolulu, Hawaii, AUG 21 2001.

/s/ Eden Elizabeth Hifo
JUDGE OF THE ABOVE ENTITLED COURT

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIHARA, Plaintiffs, vs. DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAII, et al., Defendants.	CIVIL NO. 96-3011-07 ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON JANUARY 6, 2000 HEARING: DATE: January 25, 2000 TIME: 8:30 a.m. JUDGE: Hon. Linda Luke TRIAL DATE: FEBRUARY 1, 2000

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON JANUARY 6, 2000

(Filed Mar. 14, 2000)

Plaintiffs' Motion for Partial Summary Judgment filed January 6, 2000 came on for hearing on January 25, 2000 at 8:30 a.m. before the Honorable Linda Luke, Judge of the above-entitled Court, with Evan R. Shirley, Esq., Stanley E. Levin, Esq. and Gregory A. Ferren, Esq. appearing on behalf of Plaintiffs Myles Tamashiro, Warren Toyama, Heather Farmer, Filo Tu, Jeanette Tu, Lynn Misaki, Clyde Ota, Miriam Onomura, and Yoshiko Nishimura (hereinafter "Plaintiffs"); and Marie M. Gavigan, Esq. appearing on behalf of Defendants Department of Human Services, State of Hawaii, Susan Chandler, in her capacity as Director of the State of Hawaii Department of Human Services, Jon L. Koki, in his capacity as Business Manager of Ho'opono, Neil Shim, in his capacity as Administrator of the Division of Vocational Rehabilitation State of Hawaii, Department of Human Services, and Dave Eveland, in his capacity of Administrator of the Services of the Blind Branch of the Sate [sic] of Hawaii, Department of Human Services (hereinafter "State Defendants").

The Court, having read the motion and the memoranda, affidavits, declarations, and exhibits, and other materials filed in support and in opposition to the motion, and having heard argument, and no good cause appearing therefore, hereby finds as follows that:

1. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and declarations and the exhibits attached

thereto, show that there is no genuine issue as to any fact material to the issue of the liability of State Defendants to Plaintiffs in this case. These facts establish the following:

A. Each of the Plaintiffs herein is legally blind, duly licensed by the Department of Human Services, State of Hawaii and is a beneficiary of the State of Hawaii blind vendor program, sometimes known as the "State of Hawaii Randolph-Sheppard Program," originally established in 1937 and currently codified as Hawaii Revised Statutes ("HRS") § 102-14 and Hawaii Administrative Rules ("HAR") § 17-402-17. The status of each of the Plaintiffs as legally blind, duly licensed and as a beneficiary of the State of Hawaii blind vendor program is determined by this court to be a matter of fact based upon pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and declarations and the exhibits attached thereto (collectively, "Pleadings, Depositions, Admissions, Declarations and Exhibits"), and this court's review of the applicable provisions of the Hawaii Revised Statutes, Hawaii Administrative Rules, respective legislative histories, and orders of the executive branch of state government, including the formal Attorney General Opinion dated October 23, 1992 and the formal administrative Decision and Order of the Director of the Department of Human Services dated June 6, 1997 (collectively, "Statutes, Rules, and Orders").

B. The State of Hawaii established the Randolph-Sheppard Revolving Account, HRS § 347-12.5 ("RSR Account") for the sole purpose of benefiting blind vendors exclusively in the State of Hawaii and each of the Plaintiffs herein have an interest in the RSR Account. The purpose and beneficiaries of the RSR Account and the interests of Plaintiffs in it are determined by this court to

be matters of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

C. Pursuant to the Statutes, Rules, and Orders, the State Defendants are, and were at all times from and after the effective date of HRS § 102-14 and the adoption of HAR § 17-402-17 on November 5, 1981, required by law to collect all income from vending machines on Federal State and County properties where there is no individual blind vendor, and to retain and disburse such income for the sole purpose of benefiting blind vendors exclusively. The existence of the requirement that State Defendants collect and disburse such income is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

D. Pursuant to the Statutes, Rules, and Orders, the State Defendants are, and were at all times from and after the effective date of HRS § 347-12.5 establishing the RSR Account, required by law to establish a fund to be used for the sole purpose of benefiting blind vendors exclusively and to collect income from vending machines on Federal State and County properties where there is no individual blind vendor, and to retain and disburse such income on behalf of the beneficiaries of such fund, the blind vendors, including Plaintiffs. The existence of the obligations of the State Defendants in relation to the RSR Account is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

E. A trust relationship exists between the State of Hawaii and the State Defendants. The State of Hawaii is a trustee and the blind vendors, including Plaintiffs, are the beneficiaries. The corpus of the trust or res is composed of funds to be deposited in the Randolph-Sheppard Revolving Account, Hawaii Revised Statutes § 347-12.5 ("RSR Account"), including the income from vending machines from Federal, State and County properties where there is no individual blind vendor. The existence of the trust relationship is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

F. Under the trust relationship between the State of Hawaii and the blind vendors, the State of Hawaii exercises comprehensive control over placement, operation, supervision, collection of monies and other aspects of the vending machine program; the State of Hawaii exercises comprehensive control over the fund of money collected and maintained in the RSR Account as a "custodian" of such fund for the beneficiaries; and, the State of Hawaii exercises comprehensive control over the expenditure and disbursement of moneys in the RSR Account, all as directed by the Statutes, Rules and Orders. The existence of the comprehensive control by the State of Hawaii is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

G. Pursuant to and as an integral part of the trust relationship that exists between the State of Hawaii and the State Defendants and the comprehensive control exercised by the State of Hawaii, the State of Hawaii, as

trustee, owes full fiduciary obligations to the beneficiaries, the blind vendors, including Plaintiffs. The existence of the full fiduciary obligations is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

H. The existence of the trust relationship, the comprehensive control exercised by the State of Hawaii, and the full fiduciary obligations of the trustee establishes an express or implied contractual relationship between the State of Hawaii and the blind vendors, including Plaintiffs, over the subject matter of the trust relationship, the comprehensive control exercised by the State of Hawaii, and the full fiduciary obligations of the trustee. The existence of the express or implied contractual relationship is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

I. Pursuant to the Statutes, Rules, and Orders, the State Defendants are, and were at all times from and after the effective date of HRS § 102-14 and the adoption of HAR § 17-402-17 on November 5, 1981, required by law to implement and enforce HRS § 102-14 and HAR § 17-402-17 on Federal, State and County properties in the State of Hawaii. The existence of this obligation to implement and enforce the law on Federal, State and County properties is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

J. From and after the effective date of HRS § 102-14 and the adoption of HAR § 17-402-17 on November 5, 1981 and continuing to the present, State Defendants failed, neglected or refused to implement and enforce HRS § 102-14 and HAR § 17-402-17 on County properties in the State of Hawaii. This failure, negligence or refusal to implement and enforce the law on County properties is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

K. The State Defendants have adopted by their words or conduct or both an "unwritten policy" of failing, neglecting or refusing to implement and enforce HRS § 102-14 and HAR § 17-402-17 on County properties in the State of Hawaii. The adoption of the "unwritten policy" is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

2. As to the issue of the liability of State Defendants to Plaintiffs in this case, the court finds that Plaintiffs are entitled to judgment as a matter of law that the State Defendants are liable to Plaintiffs in this case. Specifically, this court concludes as a matter of law that:

A. The Statutes, Rules, and Orders obligate and require the State Defendants to implement and enforce HRS § 102-14 and HAR § 17-402-17 on County properties in the State of Hawaii and their failure, neglect or refusal to do so is unlawful under the Statutes, Rules and Orders.

B. The Statutes, Rules, and Orders obligate and require the State Defendants to implement and enforce

HRS § 102-14 and HAR § 17-402-17 on County properties in the State of Hawaii and their failure, neglect or refusal to do so is a breach of trust and fiduciary obligations. *Restatement of the Law, Second, Trusts* § 175.

C. The State Defendants, as trustee, are chargeable with the amount required to restore the values of the trust estate, corpus or res, and trust distributions to what they would have been if the trust had been properly administered. *Restatement of the Law, Second, Trusts* § 175.

D. Governmental trustees are held to the same "most exacting fiduciary standards" as are private or non-governmental trustees in terms of obligations to administer the trust solely for the interest of the beneficiary and to use reasonable skill and care to make trust property productive or simply act as an ordinary and prudent person would in dealing with his own property. *Ahuna v. Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P.2d 1161 (1982).

E. The extent of the loss, including the "failure to realize income, capital gain, or appreciation that would have resulted from proper administration," and the consequent surcharge to State Defendants in monetary damages "for the amount necessary to compensate fully for the consequences of the breach," shall be reserved for determination at the trial in this case. *Restatement of the Law, Second, Trusts* § 175, Comment a.

F. Further, the type, nature, and extent of the declaratory and equitable relief, including, but not limited to an accounting and relief other than monetary damages, shall be reserved for trial in this case.

3. Any of the foregoing factual findings that may be properly viewed as legal conclusions may be so viewed; any of the foregoing legal conclusions that may be properly viewed as factual findings may be so viewed.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Partial Summary Judgment shall be and hereby is GRANTED as to the issue of liability. Determination as to the issues relating to the amount of damages and appropriate remedies is reserved for trial.

DATED: Honolulu, Hawaii: MAR 13 2000

Linda K.C. Luke
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

[Illegible]
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIHARA, Plaintiffs, vs. DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAII, et. al., Defendants.	CIVIL NO. 96-3011-07 ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED ON JANUARY 6, 2000 HEARING: DATE: January 25, 2000 TIME: 8:30 a.m. JUDGE: Hon. Linda Luke TRIAL DATE: February 1, 2000

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED ON JANUARY 6, 2000

(Filed Mar. 14, 2000)

Defendants' Motion for Summary Judgment filed January 6, 2000 came on for hearing on January 25, 2000 at 8:30 a.m. before the Honorable Linda Luke, Judge of the above-entitled Court, with Marie M. Gavigan, Esq. appearing on behalf of Defendants Department of Human Services, State of Hawaii, Susan Chandler, in her capacity as Director of the State of Hawaii Department of Human Services, Jon L. Koki, in his capacity as Business Manager of Ho'opono, Neil Shim, in his capacity as Administrator of the Division of Vocational Rehabilitation State of Hawaii, Department of Human Services, and Dave Eveland, in his capacity of Administrator of the Services of the Blind Branch of the Sate [sic] of Hawaii, Department of Human Services (hereinafter "State Defendants"); and Evan R. Shirley, Esq., Stanley E. Levin, Esq. and Gregory A. Ferran, Esq. appearing on behalf of Plaintiffs Myles Tamashiro, Warren Toyama, Heather Farmer, Filo Tu, Jeanette Tu, Lynn Misaki, Clyde Ota, Miriam Onomura, and Yoshiko Nishimura (hereinafter "Plaintiffs").

The Court, having read the motion and the memoranda, affidavits, declarations, and exhibits, and other materials filed in support and in opposition to the motion, and having heard argument, and no good cause appearing therefore, hereby finds as follows that:

1. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and declarations and the exhibits attached thereto, show that there is no genuine issue as to any fact

material to the issue of the asserted sovereign immunity of the State of Hawaii. These facts establish the following:

A. That a trust relationship exists between the State of Hawaii and the State Defendants. The State of Hawaii is a trustee and the blind vendors, including Plaintiffs, are the beneficiaries. The corpus of the trust or res is composed of funds to be deposited in the Randolph-Sheppard Revolving Account, Hawaii Revised Statutes § 347-12.5 ("RSR Account") including the income from vending machines from Federal, State and County properties where there is no individual blind vendor. The existence of the trust relationship is determined by this court to be a matter of fact based upon pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and declarations and the exhibits attached thereto (collectively, "Pleadings, Depositions, Admissions, Declarations and Exhibits"), and this court's review of the applicable provisions of the Hawaii Revised Statutes, Hawaii Administrative Rules, respective legislative histories, and orders of the executive branch of state government, including the formal Attorney General Opinion dated October 23, 1992 and the formal administrative Decision and Order of the Director of the Department of Human Services dated June 6, 1997 (collectively, "Statutes, Rules, and Orders").

B. Under the trust relationship between the State of Hawaii and the blind vendors, the State of Hawaii exercises comprehensive control over placement, operation, supervision, collection of monies and other aspects of the vending machine program; the State of Hawaii exercises comprehensive control over the fund of money collected and maintained in the RSR Account as a "custodian" of such fund for the beneficiaries; and, the

State of Hawaii exercises comprehensive control over the expenditure and disbursement of moneys in the RSR Account, all as directed by the Statutes, Rules and Orders. The existence of the comprehensive control by the State of Hawaii is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

C. Pursuant to and as an integral part of the trust relationship that exists between the State of Hawaii and the State Defendants and the comprehensive control exercised by the State of Hawaii, the State of Hawaii, as trustee, owes full fiduciary obligations to the beneficiaries, the blind vendors, including Plaintiffs. The existence of the full fiduciary obligations is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

D. The existence of the trust relationship, the comprehensive control exercised by the State of Hawaii, and the full fiduciary obligations of the trustee establishes an express or implied contractual relationship between the State of Hawaii and the blind vendors, including Plaintiffs, over the subject matter of the trust relationship, the comprehensive control exercised by the State of Hawaii, and the full fiduciary obligations of the trustee. The existence of the express or implied contractual relationship is determined by this court to be a matter of fact based upon the Pleadings, Depositions, Admissions, Declarations and Exhibits, and this court's review of the Statutes, Rules, and Orders.

2. As to the to the issue of the asserted sovereign immunity of the State of Hawaii, the court finds that State Defendants are *not* entitled to judgment as a matter of law that the State of Hawaii has waived sovereign immunity under the facts of this case. Specifically, this court concludes as a matter of law that:

A. That HRS § 661-1 vests in the circuit courts jurisdiction in all claims against the State founded upon any statute of the State, or upon any regulation of an executive department, or upon any contract, express or implied, with the State of Hawaii.

B. There is no requirement in HRS § 661-1 that the underlying statute/s and/or regulation/s provide a second waiver of sovereign immunity.

C. The proper inquiry is whether the source of substantive law can fairly be interpreted as mandating compensation by the government for damages sustained. *United States v. Mitchell,* 463 U.S. 206 (1983).

D. The existence of a trust relationship, the comprehensive control exercised by the State of Hawaii and the full fiduciary obligations owed by the State of Hawaii as trustee to the blind vendors, including Plaintiffs, as beneficiaries, includes as a fundamental incident the right of an injured beneficiary to sue the State for damages resulting from a breach of trust and fiduciary obligations.

E. Further, Plaintiffs' claim for declaratory and other equitable relief, including, but not limited to an accounting and relief other than monetary damages, presents a live controversy and is not moot.

3. Any of the foregoing factual findings that may be properly viewed as legal conclusions may be so viewed; any of the foregoing legal conclusions that may be properly viewed as factual findings may be so viewed.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment filed on January 6, 2000 SHALL BE, AND HEREBY IS, DENIED.

DATED: Honolulu, Hawaii: MAR 13 2000

Linda Luke
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

[Illegible]
MARIE M. GAVIGAN, ESQ.
Attorney for State Defendants

Randolph-Sheppard Vending Stand Act, 20 U.S.C. § 107 et seq., provides in part:

§ 107. Operation of vending facilities

(a) Authorization

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) Preferences regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that –

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any

such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

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§ 107a. Federal and State responsibilities

(a) Functions of Secretary; surveys; designation of State licensing agencies; qualifications for license; evaluation of programs

The Secretary of Education shall –

(1) Insure that the Rehabilitation Services Administration is the principal agency for carrying out this chapter; and the Commissioner shall, within one hundred and eighty days after enactment of the Randolph-Sheppard Act Amendments of 1974, establish requirements for the uniform application of this chapter by each State agency designated under paragraph (5) of this subsection, including appropriate accounting procedures, policies on the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of set-aside funds under section 107b(3) of this title;

(2) Through the Commissioner, make annual surveys of concession vending opportunities for blind persons on Federal and other property in the United States, particularly with respect to Federal property under the control of the General Services Administration, the Department of Defense, and the United States Postal Service;

(3) Make surveys throughout the United States of industries with a view to obtaining information that will assist blind persons to obtain employment;

(4) Make available to the public, and especially to persons and organizations engaged in work for the blind, information obtained as a result of such surveys;

(5) Designate as provided in section 107b of this title the State agency for the blind in each State, or, in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United States for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by the State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commission, [FN1] (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and (B) take such other steps, including the issuance of such rules and regulations, as

may be necessary or desirable in carrying out the provisions of this chapter.

(b) Duty of State licensing agencies to prefer blind

The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency. Such licenses shall be issued only to applicants who are blind within the meaning of section 107e of this title.

(c) Selection of location and type of facility

The State licensing agency designated by the Secretary is authorized, with the approval of the head of the department or agency in control of the maintenance, operation, and protection of the Federal property on which the facility is to be located but subject to regulations prescribed pursuant to section 107 of this title, to select a location for such facility and the type of facility to be provided.

(d) Buildings occupied by United States departments, agencies, and instrumentalities required to provide sites for facilities; exceptions

(1) After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is

determined by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

(2) The provisions of paragraph (1) shall not apply (A) when the Secretary and the State licensing agency determine that the number of people using the property is or will be insufficient to support a vending facility, or (B) to any privately owned building, any part of which is leased by any department, agency, or instrumentality of the United States and in which, (i) prior to the execution of such lease, the lessor or any of his tenants had in operation a restaurant or other food facility in a part of the building not included in such lease, and (ii) the operation of such a vending facility by a blind person would be in proximate and substantial direct competition with such restaurant or other food facility except that each such department, agency, and instrumentality shall make every effort to lease property in privately owned buildings capable of accommodating a vending facility.

(3) For the purposes of this subsection, the term "satisfactory site" means an area determined by the Secretary to have sufficient space, electrical and plumbing outlets, and such other facilities as the Secretary may by regulation prescribe, for the location and operation of a vending facility by a blind person.

(e) State licensing agency in States having vocational rehabilitation plans

In any State having an approved plan for vocational rehabilitation pursuant to the Vocational Rehabilitation Act or the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.], the State licensing agency designated under paragraph (5) of subsection (a) of this section shall be the State agency designated under section 101(a)(2)(A) of such Rehabilitation Act of 1973 [29 U.S.C.A. § 721(a)(2)(A)].

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§ 107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree –

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;

(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: Provided, however, That such equipment and stock may be owned by the licensing agency for use of the blind, or by

the blind individual to whom the license is issued: And provided further, That if ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing;

(3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and may be used only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: Provided, however, That in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary;

(4) to make such reports in such form and containing such information as the Secretary may from time to time require and to comply with such provisions as he may from time to time find necessary to assure the correctness and verification of such reports;

(5) to issue such regulations, consistent with the provisions of this chapter, as may be necessary for the operation of this program;

(6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

* * *

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§ 107d-1. Grievances of blind licensees; hearing and arbitration; noncompliance by federal departments and agencies; complaints by state licensing agencies; arbitration

(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute

pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107(b) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

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§ 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint filed under section 107d-1 of this title, the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b) of this section. Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

(b) Composition of panel; designation of chairman; termination of violations

(1) The arbitration panel convened by the Secretary to hear grievances of blind licensees shall be composed of three members appointed as follows:

(A) one individual designated by the State licensing agency;

(B) one individual designated by the blind licensee; and

(C) one individual, not employed by the State licensing agency or, where appropriate, its parent agency, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (1)(A), (B), or (C), the Secretary shall designate such member on behalf of such party.

(2) The arbitration panel convened by the Secretary to hear complaints filed by a State licensing agency shall be composed of three members appointed as follows:

(A) one individual, designated by the State licensing agency;

(B) one individual, designated by the head of the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose; and

(C) one individual, not employed by the Federal department, agency, or instrumentality controlling the Federal property over which the dispute arose, who shall serve as chairman, jointly designated by the members appointed under subparagraphs (A) and (B).

If any party fails to designate a member under subparagraph (2)(A), (B), or (C), the Secretary shall designate such member on behalf of such party. If the panel appointed pursuant to paragraph (2) finds that the acts or practices of any such department, agency, or instrumentality are in violation of this chapter, or any regulation issued thereunder, the head of any such department, agency, or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

(c) Publication of decisions in Federal Register

The decisions of a panel convened by the Secretary pursuant to this section shall be matters of public record and shall be published in the Federal Register.

(d) Payment of costs by the Secretary

The Secretary shall pay all reasonable costs of arbitration under this section in accordance with a schedule of fees and expenses he shall publish in the Federal Register.

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§ 107d-3. Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; ceiling on amount for individual licensee

In accordance with the provisions of subsection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the

State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling than he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of

all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

(c) Disposal of accrued vending machine income by State licensing agency

All vending machine income which accrues to a State licensing agency pursuant to subsection (a) of this section shall be used to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees as provided under section 107b(3)(E) of this title. Any vending machine income remaining after application of the first sentence of this subsection shall be used for the purposes specified in sections 107b(3)(A), (B), (C), and (D) of this title, and any assessment charged to blind licensees by a State licensing agency shall be reduced pro rata in an amount equal to the total of such remaining vending machine income.

(d) Income from vending machines in certain locations excepted

Subsections (a) and (b)(1) of this section shall not apply to income from vending machines within retail sales outlets under the control of exchange or ships' stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(e) Regulations establishing priority for operation of cafeterias

The Secretary, through the Commissioner, shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determines, on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.

(f) Existing arrangements more favorable to blind licensees unaffected

This section shall not operate to preclude preexisting or future arrangements, or regulations of departments, agencies, or instrumentalities of the United States, under which blind licensees (1) receive a greater percentage or amount of vending machine income than that specified in subsection (b)(1) of this section, or (2) receive vending machine income from individual locations, installations, or facilities on Federal property the total of which at such individual locations, installations, or facilities does not exceed $3,000 annually.

(g) Regulations for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

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§ 107e. Definitions

As used in this chapter –

(1) "blind person" means a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select;

(2) "Commissioner" means the Commissioner of the Rehabilitation Services Administration;

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Education;

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia;

(7) "vending facility" means automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment as the Secretary may by regulation prescribe as being necessary for the sale of the articles or services described in section 107a(a)(5) of this title and which may be operated by blind licensees; and

(8) "vending machine income" means receipts (other than those of a blind licensee) from vending machine operations on Federal property, after cost of goods sold (including reasonable service and maintenance costs), where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind licensee) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States.

Title 9 of the Hawai'i Revised Statutes provide in part:

§ 102-14. Use of public buildings by blind or visually handicapped persons.

(a) For the purpose of providing blind or visually handicapped persons, as defined in sections 235-1, 347-1, and 347-2

with remunerative employment, enlarging their economic opportunities and stimulating them to greater efforts in striving to make themselves self-supporting, blind or visually handicapped persons registered by the department of human services under section 347-6 and issued permits under subsection (c) shall be authorized to operate vending facilities and machines in any state or county public building for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and such other articles or services prepared on or off the premises in accordance with all applicable laws.

(b) The department of human services, after consultation with authorities responsible for management of state or county public buildings, shall adopt rules in accordance with chapter 91, necessary for the implementation of this section, including, but not limited to rules to assure that priority be given to registered blind or visually handicapped persons in the operation of vending facilities in state or county public buildings and to establish, whenever feasible, one or more vending facilities in all state and county public buildings.

(c) Assignment of vending facilities and space for vending machines shall be by permit issued by the department of human services.

(d) No person shall advertise or otherwise solicit the sale of food or beverages for human consumption in any public building which is in competition with a vending facility or machine operated or maintained by a duly authorized blind or visually handicapped person as prescribed by rules and regulations established under chapter 91. Any person who violates this subsection shall be subject to a fine of not more than $1,000.

(e) After July 1, 1981, or upon the expiration of vending machine contracts in existence on June 10, 1981, no vending machines shall be placed in any state or county public building in which there is a vending facility or machine assigned by permit to a blind or visually handicapped person except pursuant to a permit issued by the department of human services.

(f) Any permit granted pursuant hereto may be terminated by the department of human services if the department determines that the vending facility or machine is not being operated in accordance with prescribed rules.

(g) This section shall not apply to the judiciary history center facilities in the Ali'iolani Hale building, University of Hawai'i system, public library system facilities, department of education facilities, department of transportation airport and harbor restaurant and lounge facilities and operations, public parks, and state and county facilities designed and intended for use as facilities for entertainment and other public events.

(h) After July 1, 1981, any department, agency, or instrumentality of the State or any of its political subdivisions planning the construction, substantial alteration, or renovations of any building shall consider including plans for a vending facility maintained or operated by a blind or visually handicapped person. The present vendor who is operating a vending facility shall not be displaced or dislocated from any state or county building because of renovations or substantial alterations, except for any temporary displacement or dislocation which may be necessary for the completion of the renovations or alterations. Any such vendor shall have the first option to operate the facility upon completion of the renovations or substantial alterations.